

# DOCKET



# SUPREME COURT

OF THE UNITED STATES

No. 11-1179

Title: American Tradition Partnership, Inc., fka Western Tradition Partnership, Inc., et al., Petitioners  
v.  
Steve Bullock, Attorney General of Montana, et al.

Docketed: March 28, 2012

Linked with 11A762

Lower Ct: Supreme Court of Montana

Case Nos.: (DA 11-0081)

Decision Date: December 30, 2011

-----Date----- Proceedings and Orders-----

Feb 9 2012 Application (11A762) for a stay pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Kennedy.

Feb 10 2012 Response to application (11A762) requested by Justice Kennedy, due Wednesday, February 15, 2012, by 5:00 p.m. EST.

Feb 15 2012 Response to application from respondents filed.

Feb 17 2012 Application (11A762) referred to the Court.

Feb 17 2012 Application (11A762) granted by the Court. The application for stay presented to Justice Kennedy and by him referred to the Court is granted, and the Montana Supreme Court's December 30, 2011, decision in case No. DA 11-0081, is stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court. Statement of Justice Ginsburg, with whom Justice Breyer joins, respecting the grant of the application for stay.

Mar 26 2012 Petition for a writ of certiorari filed. (Response due April 27, 2012)

Apr 12 2012 Order extending time to file response to petition to and including May 18, 2012.

Apr 26 2012 Brief amici curiae of Free Speech for People, et al. filed.

Apr 26 2012 Brief amicus curiae of Senator Mitch McConnell filed.

Apr 27 2012 Brief amicus curiae of Citizens United filed.

Apr 27 2012 Brief amici curiae of Former Officials of the American Civil Liberties Union in support of neither party filed.

Apr 27 2012 Brief amicus curiae of Chamber of Commerce of the United States of America filed.

May 17 2012 Brief amici curiae of Retired Justices of the Montana Supreme Court, et al. filed.

May 18 2012 Brief amici curiae of United States Representatives Robert Brady, et al. filed.

May 18 2012 Brief amici curiae of United States Senators Sheldon Whitehouse, et al. filed.

May 18 2012 Brief of respondents Steve Bullock, Attorney General of Montana, et al. in opposition



filed.

May 18 2012 Brief amici curiae of Montana Trial Lawyers Association, et al. filed.

May 18 2012 Brief amici curiae of Brennan Center for Justice at N.Y.U. School of Law, et al. filed.

May 18 2012 Brief amici curiae of Former Federal Election Commission Officials, et al. filed.

May 18 2012 Brief amici curiae of New York, et al. filed.

May 18 2012 Brief amici curiae of Walter Dellinger, and James Sample filed.

May 18 2012 Brief amici curiae of AARP, et al. filed.

May 18 2012 Brief amicus curiae of Essential Information filed.

May 18 2012 Brief amicus curiae of The Eleventh Amendment Movement (TEAM) filed.

May 25 2012 Reply of petitioners American Tradition Partnership, Inc., fka Western Tradition Partnership, Inc., et al. filed.

May 29 2012 DISTRIBUTED for Conference of June 14, 2012.

Jun 18 2012 DISTRIBUTED for Conference of June 21, 2012.

Jun 25 2012 Petition GRANTED. Judgment REVERSED Justice Breyer filed a dissenting opinion. Opinion per curiam. (Detached Opinion)

Jul 27 2012 MANDATE ISSUED.

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**PETITION  
FOR  
WRIT OF  
CERTIORARI**

11-1179

Supreme Court, U.S.  
FILED

MAR 26 2012

OFFICE OF THE CLERK

No. 11-

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In The  
**Supreme Court of the United States**

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**American Tradition Partnership, Inc., f.k.a.  
Western Tradition Partnership, Inc., et al.,  
*Petitioners***

*v.*

**Steve Bullock, Attorney General of Montana  
et al., *Respondents***

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On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Montana

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**Petition for a Writ of Certiorari**

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## Question Presented

In *Citizens United v. FEC*, 130 S.Ct. 876 (2010), this Court held that a federal ban on corporate independent political expenditures was unconstitutional under the First Amendment. The Montana Supreme Court, however, upheld a ban on corporate independent political expenditures in Montana state elections because it said that “unlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history.” App.13a. This presents the following issue.

Whether Montana is bound by the holding of *Citizens United*, that a ban on corporate independent political expenditures is a violation of the First Amendment, when the ban applies to state, rather than federal, elections.

## **Parties to the Proceeding Below**

Appellants listed by the court below were American Tradition Partnership, Inc., formerly known as Western Tradition Partnership, Inc.; Montana Shooting Sports Association, Inc.; and Champion Painting, Inc. Western Tradition Partnership did not file a notice of appeal with the other two corporations, but the Montana Supreme Court included it in the caption and the case opinion as if it were an appellee and it is bound by that court's decision.

Appellees below were the Attorney General of the State of Montana (currently Stephen C. "Steve" Bullock, *see* <https://doj.mt.gov/>) and the Commissioner of the Commission for Political Practices (currently James W. "Jim" Murry, *see* <http://politicalpractices.mt.gov/default.mcpix>).

## **Corporate Disclosure**

No petitioner corporation has a parent corporation or any publicly held corporation owning 10% or more of any stock.

## Table of Contents

Question Presented.....	(i)
Parties to the Proceeding Below.....	(ii)
Corporate Disclosure.....	(ii)
Table of Authorities.....	(vi)
Petition.....	1
Opinions Below.....	1
Jurisdiction.....	1
Constitutions, Statutes, and Rules.....	1
Statement of the Case.....	3
Reasons to Grant Certiorari.....	7
I. The Decision Below Conflicts with the Holding of <i>Citizens United</i> .....	7
II. The Decision Below Conflicts with the Reasoning of <i>Citizens United</i> .....	10
A. The State Court Rejected this Court's Holding that a PAC-Option Is a Ban Because PACs Do Not Speak for Cor- porations.....	10

B.	The State Court Rejected this Court's Holding that Strict Scrutiny Applies to the Corporate Ban.. . . .	12
C.	The State Court Rejected this Court's Holding that No Cognizable Interest Justifies Banning Corporate Independent Expenditures.. . . .	13
1.	Preserving the Integrity of the Electoral Process.. . . .	14
2.	Encouraging Voter Participation.. .	17
3.	Protecting and Preserving a System of Elected Judges.. . . .	18
III.	The Decision Below Creates Splits with Federal Circuit Courts... . . . .	19
IV.	This Case Presents an Important Federal Question that Should Be Decided Summarily... . . . .	20
A.	The Case Is of Great Public Importance Because It Involves Four Vital Federal Issues... . . . .	20
B.	The Decision of the Montana Supreme Court Should Be Summarily Reversed.. . . .	23
	Conclusion.. . . .	33

## Appendix Contents

Opinion, Montana Supreme Court.....	1a
Order on Cross-Motions for Summary Judgment, Montana First Judicial District Court, Lewis and Clark County. ....	94a
Judgment, Montana First Judicial District Court, Lewis and Clark County. ....	111a
Order, Montana Supreme Court (denying stay) .....	113a
First Amended Complaint. ....	115a



## Table of Authorities

### Cases

<i>American Tradition Partnership v. Bullock</i> , No. 11A762, 2012 WL 521107 (U.S. Feb. 17, 2012).....	7, 22, 27
<i>Arizona Free Enterprise Club's Freedom Club PAC v. Bennett</i> , 131 S.Ct. 2806 (2011). . . . .	17
<i>Ashland Oil, Inc. v. Tax Commissioner of West Virginia</i> , 497 U.S. 916 (1990). . . . .	33
<i>Austin v. Michigan Chamber of Commerce</i> , 494 U.S. 652 (1990).....	15, 23
<i>Bluman v. FEC</i> , 132 S.Ct. 1087 (2012). . . . .	26
<i>Bluman v. FEC</i> , 800 F.Supp.2d 281 (D.D.C. 2011) . . . . .	25
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976). . . . .	16-17, 24, 26-28, 32
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 129 S.Ct. 2252 (2009). . . . .	18
<i>Citizens United v. FEC</i> , 130 S.Ct. 876 (2010) . . . . .	<i>passim</i>
<i>Colorado Republican Federal Campaign Committee v. FEC</i> , 518 U.S. 604 (1996).....	27

<i>Connaly v. Georgia</i> , 429 U.S. 245 (1977).....	33
<i>El Vocero de Puerto Rico v. Puerto Rico</i> , 508 U.S. 147 (1993).....	33
<i>EMILY's List v. FEC</i> , 581 F.3d 1 (D.C. Cir. 2009) .....	20
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978).....	16
<i>Greene v. Georgia</i> , 519 U.S. 145 (1996). ....	33
<i>Kaup v. Texas</i> , 538 U.S. 626 (2003). ....	33
<i>Long Beach Chamber of Commerce v. Long Beach</i> , 603 F.3d 684 (9th Cir. 2010). ....	20
<i>Marmet Health Care Center, Inc. v. Brown</i> , 132 S.Ct. 1201 (2012). ....	7
<i>Montana Chamber of Commerce v. Argenbright</i> , 266 F.3d 1049 (9th Cir. 2000). ....	11
<i>New Mexico v. Reed</i> , 524 U.S. 151 (1998). ....	33
<i>North Carolina Right to Life v. Leake</i> , 525 F.3d 274 (4th Cir. 2008).....	19, 30
<i>Ohio v. Reiner</i> , 532 U.S. 17 (2001). ....	33
<i>Personal PAC v. McGuffage</i> , No. 12-CV-1043, 2012 WL 850744 (N.D. Ill. Mar. 13, 2012).20, 22	

<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833 (1992).	24
<i>Republican Party of Minnesota v. White</i> , 536 U.S. 765 (2002).	19
<i>Republican Party of New Mexico v. King</i> , No. 11-CV-900, 2012 WL 219422 (D.N.M. Jan. 5, 2012).	20
<i>Rodriguez de Quijas v. Shearson/American Express, Inc.</i> , 490 U.S. 477 (1989).	7
<i>Rose v. Arkansas State Police</i> , 479 U.S. 1 (1986)	33
<i>SpeechNow.org v. FEC</i> , 599 F.3d 686 (D.C. Cir. 2010).	20
<i>Thalheimer v. City of San Diego</i> , 645 F.3d 1109 (9th Cir. 2011).	20
<i>Trevino v. Texas</i> , 503 U.S. 562 (1992).	33
<i>Wisconsin Right to Life State PAC v. Barland</i> , 664 F.3d 139 (7th Cir. 2011).	19, 22
<i>Wisconsin Right to Life v. FEC</i> , 551 U.S. 449 (2007).	6
<i>Yamada v. Kuramoto</i> , 744 F.Supp.2d 1075 (D. Haw. 2010).	20

***Constitutions, Statutes, Regulations & Rules***

11 C.F.R. 109.21. . . . .	30
28 U.S.C. 1257. . . . .	1
Mont. Admin. R. 44.10.323(3). . . . .	3
Mont. Code Ann. 1-13-101(11). . . . .	2
Mont. Code Ann. 13-35-227. . . . .	1, 3, 5
Mont. Code Ann. 13-37-128(2). . . . .	3
Mont. Const. art. II, § 7. . . . .	6
U.S. Const. amend. I. . . . .	<i>passim</i>
U.S. Const. amend. XIV, § 1. . . . .	1
U.S. Const. art. VI, ¶ 3. . . . .	32

***Other Authorities***

Paul Blumenthal, "Super PACs \$500,000-Plus Donors Account For Majority Of Money," The Huffington Post (Mar. 14, 2012). . . . .	29
"Coalition Takes Aim at Corporate Donors to Super PACs," The Wall Street Journal (Mar. 12, 2012). . . . .	29

Dan Eggen, "Obama gives blessing to a super PAC," <i>The Washington Post</i> (Feb. 6, 2012).	25
FEC, Advisory Opinion 2010-11 (Commonsense Ten).....	25
Tom Goldstein, "The Supreme Court, Citizens United II, and the November Election," SCOTUSblog (Feb. 18, 2012).....	33
Jon Hinck, <i>Maine Bill Would Challenge Citizens United Ruling</i> , <i>The Huffington Post</i> (Jan. 24, 2012).	22
President Barack Obama, Remarks by the President in State of Union Address (Jan. 27, 2010).....	25
Anna Palmer & Abby Phillip, "Corporations don't pony up for super PACs," <i>POLITICO</i> (Mar. 8, 2012) .....	29
Luke Rosiak, "Corporations make first political donations—and it's not through checks," <i>The Washington Times</i> (Feb. 20, 2012).	29
Adam Sorensen, "Among Romney Super PAC's Corporate Donors, Big Names Not All Easy to Spot," <i>Time</i> (Feb. 22, 2012).....	28
South Carolina State Ethics Commission, SEC AO2011-004. ....	20

## Petition

Petitioners request review of *Western Tradition Partnership, Inc. v. Attorney General*, \_\_\_P.3d\_\_\_, 363 Mont. 220 (Mont. 2011).

## Opinions Below

The trial court's Order (App.94a) is unreported but available at 2010 WL 4257195. The Montana Supreme Court's Opinion (App.1a) is reported at 363 Mont. 220 (available at 2011 WL 6888567).

## Jurisdiction

The decision and judgment below were filed on December 30, 2011. Jurisdiction is invoked under 28 U.S.C. 1257.

## Constitutions, Statutes, and Rules

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

Montana's corporate independent-expenditure ban ("Ban"), Mont. Code Ann. 13-35-227, follows:

(1) A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.

(2) A person, candidate or political committee may not accept or receive a corporate con-

tribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee or member of the corporation.

(4) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

The "expenditure" definition, Mont. Code Ann. 13-101(11), follows:

(a) "Expenditure" means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an election.

(b) "Expenditure" does not mean:

(i) services, food, or lodging provided in a manner that they are not contributions under subsection (7);

(ii) payments by a candidate for a filing fee or for personal travel expenses, food, clothing, lodging, or personal necessities for the candidate and the candidate's family;

(iii) the cost of any bona fide news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation; or

(iv) the cost of any communication by any



membership organization or corporation to its members or stockholders or employees.

"Expenditure" includes "independent expenditures," defined as follows:

"Independent expenditure" means an expenditure for communications expressly advocating the success or defeat of a candidate or ballot issue which is not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or political committee or an agent of a candidate or political committee. . . .

Mont. Admin. R. 44.10.323(3).

"Person" means an individual, corporation, association, firm, partnership, cooperative, committee, club, union, or other organization or group of individuals or a candidate as defined in subsection (6)." Mont. Code Ann. 13-1-101(20).

The penalty provision, Mont. Code Ann. 13-37-128(2), follows:

A person who makes or receives a contribution or expenditure in violation of 13-35-227, 13-35-228, or this chapter or who violates 13-35-226 is liable in a civil action brought by the commissioner or a county attorney pursuant to the provisions outlined in 13-37-124 and 13-37-125 for an amount up to \$500 or three times the amount of the unlawful contribution or expenditure, whichever is greater.

### **Statement of the Case**

Petitioners ("Corporations") are corporations. American Tradition Partnership, Inc. ("ATP") (previ-



ously Western Tradition Partnership, Inc. ("WTP")) is a nonprofit ideological corporation registered in Montana. Montana Shooting Sports Association, Inc. ("MSSA") is a nonprofit Montana corporation promoting issues related to shooting sports. Champion Painting, Inc. ("Champion Painting") is a small, family-owned painting and drywall business and Montana corporation, with no employees or members, whose sole shareholder is Kenneth Champion.

The Corporations want to make independent expenditures (communications expressly advocating the election or defeat of clearly identified candidates) but are barred by Montana's corporate independent-expenditures Ban, which they challenge as a violation of their free-speech rights under the First Amendment.

Respondents ("State"), Montana officials with authority to enforce the Ban, are sued in their official capacities as the Attorney General and the Commissioner of the Commission for Political Practices. Despite *Citizens United*, the Commissioner believes Montana may constitutionally enforce its Ban. Compare 1st Am. Comp. ¶ 18 (App.123a) with Answer ¶ 18 (admit).

The Corporations challenged the Ban as a free-speech violation under the First Amendment and Montana Constitution, and the First Amendment claim was argued and decided in both the state trial court and the Montana Supreme Court. Rule 14.1(g)(i). The initial complaint was filed on March 8, 2010. An amended complaint (App.115a) was filed on April 15, 2010. Count 1 sought a declaratory judgment of unconstitutionality under the First Amend-

ment (App.123a, ¶ 24), quoting *Citizens United*, “[p]olitical speech does not lose its First Amendment protection “simply because its source is a corporation”” (App.124a, ¶ 26, citations omitted), and asserting that the Ban “infringes upon the Plaintiffs’ political speech freedoms under both the Montana and United States Constitution” for prohibiting corporate independent expenditures (App.124a, ¶ 27).

The court granted the Corporations summary judgment on October 18, 2010 (App.94a), holding the Ban unconstitutional under the First Amendment and enjoining its enforcement:

Therefore, the Court declares that Section 13-35-227(1), MCA, as it pertains to independent corporate expenditures, is unconstitutional and unenforceable due to the operation of the First Amendment to the United States Constitution. Since Section 227 violates the First Amendment to the United States Constitution, this Court sees no need to decide whether Section 227 violates the Montana Constitution.

App.107a. Judgment was filed on January 31, 2011.  
App.111a.

The State appealed (Corporations cross-appealed the denial of attorneys fees) this issue:

Whether the requirement that corporations make candidate campaign expenditures through individual funds voluntarily raised, first enacted as the Corrupt Practices Act of 1912 and now codified at Mont. Code Ann. § 13-35-227, abridges the freedom of speech guaranteed by U.S. Const. amends. I and XIV, or impairs the freedom of speech guaranteed

by Mont. Const. art. II, § 7.

Br. of Appellants at 1 (available at <http://supreme.courtdocket.mt.gov/search/case?case=14335>).

The Montana Supreme court decided that *Citizens United* did not control this case, upholding the Ban against the First Amendment challenge:

The Dissents assert that *Citizens United* holds unequivocally that no sufficient government interest justifies limits on political speech. We disagree. The Supreme Court held that laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the law furthers a compelling state interest and is narrowly tailored to that interest. The Court, citing *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 464 . . . (2007), clearly endorsed an analysis of restrictions on speech, placing the burden upon the government to establish a compelling interest. *Citizens United*, 130 S.Ct. at 898. Here the government met that burden.

App.12-13a. The court found a compelling interest:

*Citizens United* does not compel a conclusion that Montana's law prohibiting independent political expenditures by a corporation related to a candidate is unconstitutional. Rather, applying the principles enunciated in *Citizens United*, it is clear that Montana has a compelling interest to impose the challenged rationally-tailored statutory restrictions. We reverse the District Court . . . .

App.32a. Though the Montana Supreme Court dis-

cussed certain aspects of Montana constitutional law (App. 24-25a), it did not reach the Montana constitutional claim (App.8a).

This Court stayed the decision of the Montana Supreme Court pending certiorari consideration and any merits consideration. *See American Tradition Partnership, Inc. v. Bullock*, No. 11A762, 2012 WL 521107 (U.S. Feb. 17, 2012).

## **Reasons to Grant Certiorari**

Certiorari should be granted because (I) the decision below conflicts with the holding of *Citizens United*, (II) the decision below conflicts with the reasoning of *Citizens United*, (III) the decision below creates splits with federal circuit courts, and (IV) this case presents an important federal question.<sup>1</sup>

### **I.**

#### **The Decision Below Conflicts with the Holding of *Citizens United*.**

In this Court's order staying the decision below, Justice Ginsburg, joined by Justice Breyer, issued a statement concluding: "Because lower courts are bound to follow this Court's decisions until they are withdrawn or modified . . . , *Rodriguez de Quijas v. Shearson / American Express, Inc.*, 490 U.S. 477, 484 (1989), I vote to grant the stay." (No. 11A762.) This is well established law—see, e.g., *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 1202 (2012) (per curiam) ("When this Court has fulfilled

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<sup>1</sup> The reasons for granting certiorari are also reasons to summarily reverse the Montana Supreme Court. This is discussed more specifically in Part IV.

its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U.S. Const., Art. V, cl.2.")—that the Montana Supreme Court failed to apply.

The unjustified refusal of the court below to follow *Citizens United* was noted by the two dissenters to the Montana Supreme Court's decision. Justice Nelson wrote an extended dissent explaining in detail why the majority was wrong in not following *Citizens United* (App.40-93a), beginning by saying that *Citizens United* left no option:

The Supreme Court could not have been more clear in *Citizens United* . . . : corporations have broad rights under the First Amendment . . . to engage in political speech, and corporations cannot be prohibited from using general treasury funds for this purpose based on antidistortion, anti-corruption, or shareholder-protection interests. The language of the *Citizens United* majority opinion is remarkably sweeping and leaves virtually no conceivable basis for . . . restricting corporate . . . independent expenditures.

App.40-41a. In considering whether "Montana identified a compelling state interest, not already rejected by the Supreme Court, that would justify the outright ban," he noted that "the Supreme Court has already rebuffed each and every one of them." App.41a. He reminded the state justices of their oaths to abide by the U.S. Constitution, as interpreted by this Court:

[W]hen the highest court in the country has spoken clearly on a matter of federal constitu-



tional law, as it did in *Citizens United*, . . . this Court . . . is not at liberty to disregard or parse that decision in order to uphold a state law that, while politically popular, is clearly at odds with the Supreme Court's decision. This is the rule of law and is part and parcel of every judge's and justice's oath of office to "support, protect and defend the constitution of the United States." In my view, this Court's decision today fails to do so.

App.47a.

Justice Baker also dissented, agreeing with Justice Nelson that we are constrained by *Citizens United* to declare [the Ban] unconstitutional . . . . [T]he State of Montana made no more compelling a case than that painstakingly presented in the 90-page dissenting opinion of Justice Stevens and emphatically rejected by the majority in *Citizens United*."

App.33a.

The Montana Supreme Court tried to distinguish *Citizens United*, saying that *Citizens United* did not decide that corporations may make independent expenditures as a matter of law, but based on that case's unique facts: "*Citizens United* was decided under its facts or lack of facts." App.12a. The Court claimed that "the District Court failed to give adequate consideration to the record," but said "[w]e do so now, because, unlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history." App.13a.

However, while a Montana state law, rather than

a federal one, is at issue, Montana is bound by this Court's holding in *Citizens United* that a corporate ban on independent political speech is unconstitutional under the First Amendment, and Montana's courts are obligated to apply it. This petition should be granted to correct this error.

## II.

### **The Decision Below Conflicts with the Reasoning of *Citizens United*.**

Furthermore, the Montana Supreme Court's analysis of the *federal* constitution and *Citizens United*, upon which the court's refusal to adhere to *Citizens United* was justified, was also erroneous on all controlling analytical points. These are considered in turn.

#### **A. The State Court Rejected this Court's Holding that a PAC-Option Is a Ban Because PACs Do Not Speak for Corporations.**

The Montana Supreme Court refused to follow this Court's clear holding that a corporation's political committee ("PAC") does not speak for a corporation. This Court held that "[a] PAC is a separate association from the corporation. So the PAC . . . does not allow corporations to speak." *Citizens United*, 130 S.Ct. at 897. But the court below found the Ban "narrowly tailored," because "WTP can still speak through its own political committee/PAC." App.32a.

The Montana Supreme Court also said that "the [Ban] only minimally affects . . . MSSF [sic] and Champion" (App.32a), because "Mr. Marbut, on behalf of MSSF [sic], has been an active fixture in Montana politics" and "the burden upon Kenneth Cham-

pion . . . to establish a political committee . . . are [sic] particularly minimal" (App.14-15a). But Mr. Marbut and Mr. Champion are not the plaintiff *corporations*, which are separate legal entities and which *Citizens United* held have their own right to make independent expenditures. The Montana Supreme Court refused to apply this foundational holding of *Citizens United*, attempting to evade it by transparent misdirection.

The Montana Supreme Court also argued that *Citizens United* turned instead on the difficulties of federal PAC compliance. It argued that *Citizens United* does not control because "Montana . . . political committees are easy to establish and easy to use to make independent expenditures . . ." App.32a. But *Citizens United* held that "[e]ven if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with [a ban]. PACs are burdensome alternatives." 130 S.Ct. at 897 (emphasis added). The court below ignored the italicized part of this quote, pretending that *Citizens United* just held that PACs are burdensome, and then argued that Montana PACs are less burdensome, so the Ban is "narrowly tailored." App.31-32a. Putting aside the fact that Montana PAC burdens remain onerous,<sup>2</sup> Montana's Ban is a *ban* and therefore "not a permissible remedy." *Citizens United*, 130 S.Ct. at 911.

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<sup>2</sup> See *Montana Chamber of Commerce v. Argenbright*, 266 F.3d 1049 (9th Cir. 2000) ("requiring corporations to make independent expenditures (even for candidates) through a segregated fund burdens corporate expression").



**B. The State Court Rejected this Court's Holding that Strict Scrutiny Applies to the Corporate Ban.**

The Montana Supreme Court also refused to apply this Court's First Amendment strict-scrutiny analysis to Montana's Ban. *Citizens United* was unequivocal in requiring strict scrutiny of both the corporate ban and the PAC-option: "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" 130 S.Ct. at 898 (citation omitted).

But the Montana Supreme Court held that, even though the MSSA and Champion Painting *corporations* could not make independent expenditures, the availability of other speech options (PAC or individual) meant that "the statute has no or minimal impact" on them so "the State is not required to demonstrate a compelling interest to support [the Ban]." App.31a. The State "is required only to demonstrate the less exacting sufficiently important interest." App.31a.

Regarding WTP, the state court held that the Ban was "narrowly tailored," because "WTP can still speak through its own . . . PAC" (App.32a), and that Montana has "compelling interests" (App.32a). This terminology makes it *seem* that the lower court applied this Court's First Amendment strict scrutiny, but it did not. True, the decision below recited that this Court requires "strict scrutiny" of "[l]aws that place severe burdens on fully protected speech" and "intermediate scrutiny" of "laws that place only a

minimal burden or that apply to speech that is not fully protected." App.24a. But at every opportunity, the state court downplayed the burden on the Corporations (because they had a PAC-option and an individual-speech option and because Montana PAC burdens are purportedly non-onerous), so *First Amendment* strict scrutiny was never applied. And the state court never even said that it was actually applying First Amendment strict scrutiny, nor did its analysis reflect the strictness of this Court's First Amendment strict scrutiny. Rather, the state court employed complaisant scrutiny, whatever the court called it.<sup>3</sup>

**C. The State Court Rejected this Court's Holding that No Cognizable Interest Justifies Banning Corporate Independent Expenditures.**

The Montana Supreme Court refused to abide by this Court's holding—as a matter of law—that *no*

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<sup>3</sup> Confusingly, the Montana Supreme Court discussed the scrutiny required by *Montana* law (App.24-25a), while deciding the First Amendment claim. Since the state court never reached the state constitutional claim, the scrutiny required by *Montana* law was irrelevant. In so doing, the court never said that Montana law requires "strict scrutiny," saying only that a "compelling interest" is required: "Under Montana law the government must demonstrate a compelling interest when it intrudes on a fundamental right, and determination of a compelling interest is a question of law." App.25a (citation omitted). The state court did hold that the Ban "is narrowly tailored" (App.31-32a), though it never said that Montana law required that. But it is not the labels that the court below used that are determinative, but the substance of its analysis.

interest was sufficiently compelling to justify banning corporate independent expenditures. See *Citizens United*, 130 S.Ct. at 904-11. As Justice Nelson declared in dissent: "The Supreme Court in *Citizens United* . . . rejected several asserted governmental interests; and this Court has now come along, retrieved those interests from the garbage can, dusted them off, slapped a 'Made in Montana' sticker on them, and held them up as grounds for sustaining a patently unconstitutional state statute." App.84a. Justice Nelson then moved systematically through proffered and possible interests, showing the majority how each failed as a matter of law. App.41-49a, 54-62a.

### 1. Preserving the Integrity of the Electoral Process.

The Montana Supreme Court asserted that Montana has a compelling interest in preventing corruption or its appearance, i.e., "a clear interest in preserving the integrity of its electoral process" (App. 16a), for which it cited Montana's history of "corrupt practices and heavy-handed influence asserted by the special interests controlling Montana's political institutions" (App.44a). The state court acknowledged that the Anaconda Company, which the court said had dominated Montana politics in the late 1800s and early 1900s, was no longer in control. App.21a. But it tried to show that the threat later endured because "the Anaconda Company maintained controlling ownership of all but one of Montana's major newspapers until 1959." App.20a. However, Montana specifically excludes from the Ban "the cost of any bona fide news story, commentary, or editorial dis-

tributed through . . . any . . . newspaper," Mont. Code Ann. 13-1-101(11)(b), so it cannot now claim that corporate newspaper expenditures is a form of corruption the Ban seeks to prevent.

This is not the first time that Montana has tried to use events of over a century ago to justify its corporate ban. In *Citizens United* itself, Montana presented the Anaconda scare through an *amicus* brief. The Montana Attorney General (a party in the present case) filed an *amici curiae* brief for several states arguing that *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), should not be overruled based, in part, on Montana's history with Anaconda. Br. Amici Curiae of Montana et al. at 7, *Citizens United*, 130 S.Ct. 876. This Court cited the brief for demonstrating, however, that coupling legal corporate lobbying with a corporate independent-expenditure ban led to "the result . . . that smaller or non-profit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government." 130 S. Ct. at 907. This Court, therefore, found that Montana's law actually caused problems rather than correcting them.

Notably missing from the Montana Supreme Court's opinion is application of this Court's holding that *independent* expenditures pose *no* quid-pro-quo-corruption risk. The state court recited that this Court "concluded that 'independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.'" App.11a (quoting *Citizens United*, 130 S.Ct. at 909). But the court erroneously declared that this remains

an open question that could be resolved differently based on Montana's facts. App.13a.

However, this Court decided this issue *as a matter of law*, dismissing any possibility that it remained an open question. As this Court put it:

A single footnote in [*First National Bank of Boston v.*] *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. 435 U.S.[ 765,] 788, n. 26 [(1978)]. For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."

*Citizens United*, 130 S.Ct. at 909. The final resolution of the issue as a matter of law was based on the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), that

"[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."

*Citizens United*, 130 S.Ct. at 909 (quoting *Buckley*, 424 U.S. at 47).

And thus the Ban is unconstitutional:

The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. *An outright ban on corporate political speech during the critical*



*preelection period is not a permissible remedy.* Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption.

130 S.Ct. at 911 (emphasis added).

*Citizens United* also expressly foreclosed broad theories of corruption as legitimate interests to limit corporate independent expenditures, limiting cognizable corruption to quid-pro-quo corruption. 130 S. Ct. at 909. In the process, it rejected other theories of corruption—antidistortion, leveling-the-playing-field, gratitude, access, circumvention, and shareholder-protection. *Id.* at 905-12. The Montana Supreme Court, however, relied on broad theories of corruption, including problems with *contributions*, to justify the Ban.

## 2. Encouraging Voter Participation.

The Montana Supreme Court also found “an interest in encouraging the full participation of the Montana electorate” to support the Ban (App.16-27a), claiming that, if corporations are allowed to make independent expenditures, “the average citizen candidate would be unable to compete against the corporate-sponsored candidate, and Montana citizens . . . would be effectively shut out of the process” (App.27a). Not only is this asserted interest *not* cognizable quid-pro-quo corruption, it is a noncognizable level-the-playing-field interest that this Court has consistently rejected. *Buckley*, 424 U.S. at 48; *Citizens United*, 130 S.Ct. at 904; *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2825-26 (2011).

### 3. Protecting and Preserving a System of Elected Judges.

And finally, the Montana Supreme Court justified the Ban because of “a compelling interest in protecting and preserving its system of elected judges” and “a concomitant interest in preserving the appearance of judicial propriety and independence so as to maintain the public’s trust and confidence.” App.27-31a. While judges are elected in Montana, and protecting the judicial system is vitally important, Montana’s argument is a rehash of interests already rejected—antidistortion and equalizing interests. See App.27-31a. And Justice Stevens raised concerns about corporate and union independent expenditures in judicial elections in *Citizens United*, 130 S.Ct. at 968 (Stevens, J., dissenting), but this Court made no exception for judicial elections, nor any indication that the question remained open. In any event, *Citizens United* held that silencing speakers is not a permissible remedy for any perceived problems. *Id.* at 911.

The state court also quoted *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2266-67 (2009), for the proposition that “Judicial integrity is . . . a state interest of the highest order.” App.29a. But in *Citizens United*, this Court expressly addressed *Caperton* and held that it did not support a ban on corporate independent expenditures. 130 S.Ct. at 910 (“*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”).<sup>4</sup>

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<sup>4</sup> Moreover, this Court already addressed judicial elec-  
(continued...)

The Montana Supreme Court's analysis conflicts with *Citizens United* at every vital analytical point and, as a result, its refusal to comply with the holding of *Citizens United* is not justified. This petition should be granted to correct this error.

### III.

#### The Decision Below Creates Splits with Federal Circuit Courts.

The Montana Supreme Court's decision creates circuit splits on the controlling analytical issues in this case—that (1) only quid-pro-quo corruption can justify restricting core political speech and (2) independent expenditures pose no such cognizable corruption risk—with the Fourth, Seventh, Ninth, and D.C. Circuits.<sup>5</sup> These federal appellate courts simply

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<sup>4</sup> (...continued)

tions in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). *White* held that “the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head.” *Id.* at 781. “If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.” *Id.* at 787-88. *See also id.* at 794-95 (Kennedy, J., concurring) (“What [a state] may not do . . . is censor what the people hear as they undertake to decide . . . . The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.”).

<sup>5</sup> *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 212-93 (4th Cir. 2008); *Wisconsin Right to Life State* (continued...)



followed *Citizens United* as precedent without trying to erroneously distinguish it, as the Montana Supreme Court did. This petition should be granted to resolve this circuit split.

#### IV.

##### **This Case Presents an Important Federal Question that Should Be Decided Summarily.**

This is a case of great public importance concerning four vital federal issues that should be decided summarily.

##### **A. The Case Is of Great Public Importance Because It Involves Four Vital Federal Issues.**

This case involves the vital federal issues of protection of core political speech protected by the First Amendment, respect for the rule of law, respect for stare decisis, and conservation of judicial resources.

First, this case involves the suppression of core

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<sup>b</sup> (...continued)

*PAC v. Barland*, 664 F.3d 139, 153-54 (7th Cir. 2011); *Long Beach Chamber of Commerce v. Long Beach*, 603 F.3d 684, 694-98 (9th Cir. 2010); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118-19 (9th Cir. 2011); *SpeechNow.org v. FEC*, 599 F.3d 686, 692-96 (D.C. Cir. 2010); *EMILY's List v. FEC*, 581 F.3d 1, 11 (D.C. Cir. 2009). *Accord Personal PAC v. McGuffage*, No. 12-CV-1043, 2012 WL 850744, \*3-4 (N.D. Ill. Mar. 13, 2012); *Republican Party of New Mexico v. King*, No. 11-CV-900, 2012 WL 219422, \*7 (D.N.M. Jan. 5, 2012); *Yamada v. Kuramoto*, 744 F.Supp.2d 1075 (D. Haw. 2010); South Carolina State Ethics Commission, SEC AO2011-004. Moreover, as Justice Nelson noted in dissent below, "[I]n 17 of the 24 states with laws affected by *Citizens United* decision, legislation has been introduced to amend the law." App.48a n.4 (citation omitted).

political speech protected by the First Amendment. If this Court had not granted a stay, Montana corporations would not enjoy the right to make independent political expenditures that corporations in federal elections and in other states enjoy. And absent a grant of certiorari and reversal of the decision below, they will not be able to exercise their free-speech rights guaranteed by the First Amendment. See *Citizens United*, 130 S.Ct. 876.

Second, this case involves disrespect for the Constitution, the rule of law, and this Court. If Montana is allowed to flout this Court's holdings in *Citizens United*, in such a willful and transparent fashion, respect for these important interests will be eroded. While parties to litigation may ask for reversal of precedent, and lower courts may invite reversal in dictum, lower courts must not be allowed to force reconsideration of precedent by refusing to follow the decisions of this Court.

Third, this case involves a failure to respect precedent and stare decisis. The Montana Supreme Court simply disagreed with the holdings of *Citizens United*, which it felt justified in disregarding it. But only this Court can overturn its own precedent and then only when permitted under the doctrine of stare decisis.

Finally, this case poses the prospect of considerable litigation if Montana is allowed assert an as-applied exception to First Amendment protection for corporate political speech. Frankly, every State thinks it is as "special" as Montana does. But this Court, in *Citizens United*, rejected "case-by-case determinations," where "archetypical political speech

would be chilled in the meantime.” 130 S.Ct. at 892. And if Montana’s argument—that independent expenditures somehow operate differently in Montana because of Montana’s history—were countenanced, there would be a flood of cases with states arguing how horribly corrupt they have been, or are, how big or small they are, and how rural or urban they are in an effort to stifle speech in their own realms.

Illinois recently made just such an as-applied argument. *Personal PAC*, No. 12-CV-1043, 2012 WL 850744 (N.D. Ill. Mar. 13, 2012). In defending limits on contributions to independent-expenditure-only political committees, Illinois argued that its experience with corruption meant that independent expenditures could cause corruption there. *Id.* at \*4.<sup>6</sup> The *Personal PAC* court, however, refused “to study Illinois’ political history,” because “this is a legal issue, and resolving it does not require an evidentiary record.” 2012 WL 850744, at \*4 (*quoting Wisconsin Right to Life State PAC*, 664 F.3d at 151). The court said it could not “modify the rulings of the Supreme Court or the Seventh Circuit.” *Id.* (*citing* Justice Ginsburg’s statement in the stay order in the present case that the opinion below did not follow *Citizens United*). It concluded on a note that addresses the scope of this Court’s consideration of this case:

As Defendants acknowledge, “If the Supreme Court grants a writ of *certiorari* in the Mon-

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<sup>6</sup> See also Jon Hinck, “Maine Bill Would Challenge *Citizens United* Ruling,” *The Huffington Post* (Jan. 24, 2012) (available at [http://www.huffingtonpost.com/jon-hinck/maine-bill-would-challeng\\_b\\_1228186.html](http://www.huffingtonpost.com/jon-hinck/maine-bill-would-challeng_b_1228186.html) (author introduced bill to follow Montana Supreme Court)).

tana case, the parameters of *Citizens United* as applied to political climates of individual states may be explained." Until that time, we, like the Montana Supreme Court, are bound to follow the Supreme Court's decisions and repeat that, even in Illinois, independent expenditures do not lead to corruption.

*Id.*

As a result, this petition should be granted.

**B. The Decision of the Montana Supreme Court Should Be Summarily Reversed.**

Furthermore, the decision of the Montana Supreme Court should be summary reversed.

First, just last term, *Citizens United* was twice-briefed and twice-argued because this Court asked for supplemental briefs addressing "whether [this Court] should overrule either or both *Austin*[, 494 U.S. 652,] and the part of *McConnell* [v. *FEC*, 540 U.S. 93 (2003),] which addresses the facial validity of 2 U.S.C. § 441b." *Citizens United*, 130 S. Ct. at 888. Montana filed an amici curiae brief with other states arguing that the ban on corporate independent expenditures should be upheld. *See supra* at 15. Given that special care, there is no reason to replot this recently, heavily plowed ground.

Second, a state court must not be allowed to force this Court into yet another round of briefing and oral argument on a recently decided issue by refusing to follow controlling precedent. This Court, not inferior courts, should decide when reconsideration of a decision is warranted.

Third, stare decisis has an especially strong effect



here in light of the antiquity of the precedent which supports *Citizens United*'s core analysis and the controversy that the decision has engendered. "[T]he antiquity of the precedent" counsels against overruling a precedent, *Citizens United*, 130 S.Ct. at 912, and that criterion is met by the antiquity of the precedent that supports *Citizens United* core analysis—that the independence of independent expenditures makes any quid-pro-quo-corruption risk noncognizable—which dates back to *Buckley*. *Citizens United* at 908-09 (citing *Buckley*, 424 U.S. at 47).

Furthermore, the considerable controversy regarding *Citizens United* and the public pressure to overturn it bring into play another doctrine, explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992):

[W]hen the Court decides a case . . . to resolve [an] intensely divisive controversy[,] . . . its decision requires . . . precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. . . . [O]nly the most convincing justification . . . could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.

*Id.* at 866-67.

Among those who have been critical is the Presi-

dent. See, for example, the President's 2010 State of the Union Address:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.<sup>[7]</sup> (Applause.) I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. (Applause.) They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.

<http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

However, this Court has already taken the course advocated here regarding this controversy by subsequently summarily affirming *Bluman v. FEC*, 800 F.Supp.2d 281 (D.D.C. 2011), which held that foreign nationals legally in the United States could be

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<sup>7</sup> Though the President decried the corporate speech liberty that now allows corporations to contribute unlimited sums to super PACs, see, e.g., FEC, Advisory Opinion 2010-11 (Commonsense Ten) (independent-expenditures-only PACs may receive unlimited contributions, including from corporations and unions), he is now reported to be encouraging support for a super PAC supporting him. See Dan Eggen, "Obama gives blessing to a super PAC," *The Washington Post* (Feb. 6, 2012) (available at [http://www.washingtonpost.com/politics/obama-in-a-switch-endorses-pro-democratic-super-pac/2012/02/06/gIQAVqnWvQ\\_story.html](http://www.washingtonpost.com/politics/obama-in-a-switch-endorses-pro-democratic-super-pac/2012/02/06/gIQAVqnWvQ_story.html)).

banned from making political contributions and independent expenditures. *Bluman v. FEC*, 132 S.Ct. 1087 (2012).

Fourth, there is nothing in the lower court's refusal to be bound by this Court's decision in *Citizens United* that establishes any of this Court's criteria for overruling precedent, some of which are discussed above and which also include workability, the antiquity of the precedent, the reliance interests at stake, whether the decision was well reasoned, and whether "experience has pointed up the precedent's shortcomings." *Citizens United*, 130 S.Ct. at 912. That should not be surprising since these elements were just considered by this Court in deciding *Citizens United* itself. However, these factors are considered briefly in turn.

*Citizens United* has not proven unworkable, as evidenced by those who have exercised their liberty under it. Lower courts, except for the decision below, have uniformly followed this Court's holding, and legislatures and government agencies, with few exceptions, have implemented the protections of *Citizens United*.

Regarding antiquity, the long history of this Court's holdings on this core issue, see *Buckley*, 424 U.S. at 47, makes the analytical essence of *Citizens United* old, though its reaffirmation in *Citizens United* is recent, which, coupled with the high controversy over the case, raises the bar for reconsideration.

Regarding reliance, many corporations and labor unions have already relied on *Citizens United* and engaged in core political speech protected by the



### First Amendment.

Regarding sound reasoning, on the core issue in *Citizens United*—whether independent expenditures can cause quid-pro-quo corruption—this Court has consistently said that they do not. See *Buckley*, 424 U.S. at 47; *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 615 (1996) (plurality); *McConnell*, 540 U.S. at 121 (“we were not persuaded [in *Buckley*] that independent expenditures posed the same risk of real or apparent corruption as coordinated expenditures.”); *id.* at 191 n.74 (same).

Nor has experience pointed up any shortcomings with *Citizens United*. Justice Ginsburg, joined by Justice Breyer, however, suggests there is:

Montana's experience, and experience elsewhere since this Court's decision in *Citizens United* . . . make it exceedingly difficult to maintain that independent expenditures by corporations “do not give rise to corruption or the appearance of corruption.” . . . A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway.

*American Tradition Partnership v. Bullock*, No. 11A762, 2012 WL 521107, at \*1 (U.S. Feb. 17, 2012) (statement appended to order granting stay).

The Montana Supreme Court's decision was not based on whether “experience has pointed up the precedent's shortcomings.” It claimed that Montana's history before *Citizens United* justified ignoring the

holding of that case. Justices Ginsburg and Breyer do not refer to Montana's as-applied argument based on the old Anaconda experience. They at least refer to the relevant experience, "since" *Citizens United*.

However, this experience cannot provide a justification to overturn *Citizens United*. This Court rejected first in *Buckley* the notion that political spending, even if "huge," is inherently corrupting 424 U.S. at 48-49 (no equalizing interest), 57 ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."). And certainly this Court in *Citizens United* expected more political spending because it overturned a Ban on political spending by thousands upon thousands of corporations and labor unions in federal election.

In addition, most of the "huge sums" being spent by super PACs are not from corporations but from individuals, so it cannot be tied to *Citizens United*. A *Time* article reports that the predictions of campaign-finance reformers have not materialized:

[T]he disclosure reflects a broader post-*Citizens United* development. Campaign finance-reform advocates have warned that unlimited donations from corporations, newly empowered to give limitless sums, would have a corrupting influence on American democracy. In many ways, their worst fears have not materialized: the overwhelming majority of donations to super PACs disclosed so far have come from a new class of celebrity super-donor.

Adam Sorensen, "Among Romney Super PAC's Corporate Donors, Big Names Not All Easy to Spot,"

Time (Feb. 22, 2012) (available at <http://swampland.time.com/2012/02/22/among-romney-super-pacs-corporate-donors-big-names-not-all-easy-to-spot/>). The *Washington Times* makes the same point: "The onslaught of million-dollar checks from major corporations feared by the critics of the Supreme Court's Citizens United ruling largely has never materialized." Luke Rosiak, "Corporations make first political donations—and it's not through checks," *The Washington Times* (Feb. 20, 2012) (available at <http://www.washingtontimes.com/news/2012/feb/20/corporations-first-political-donations-in-kind/?page=all>).<sup>8</sup> So any "huge sums" are not from corpo

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<sup>8</sup> See also Anna Palmer & Abby Phillip, "Corporations don't pony up for super PACs," *POLITICO* (Mar. 8, 2012) ("[P]ublicly traded companies have shied away from outside groups—giving less than one half of a percent of all the contributions raised by the most active super PACs.") (available at <http://www.politico.com/news/stories/0312/73804.html>); Paul Blumenthal, "Super PACs \$500,000-Plus Donors Account For Majority Of Money," *The Huffington Post* (Mar. 14, 2012) (Of "the 51 donors who have given at least \$500,000," there were 41 individuals, 9 corporations, 7 unions, 1 trade group, and 2 were "a trade group and a non-profit funding their own super PACs.") (available at [http://www.huffingtonpost.com/2012/03/14/super-pacs-donors-500000-dollars\\_n\\_1339169.html](http://www.huffingtonpost.com/2012/03/14/super-pacs-donors-500000-dollars_n_1339169.html)). Corporate reticence to contribute to super PACs may be explained by the wish to avoid a backlash. See "Coalition Takes Aim at Corporate Donors to Super PACs," *The Wall Street Journal* (Mar. 12, 2012) ("[A]n influential cross-section of groups including Common Cause and labor unions" formed coalition "to apply pressure on companies that use corporate money.") (available at <http://blogs.wsj.com/washwire/2012/03/12/coalition>).

rations but from individuals, making those sums irrelevant to reconsideration of *Citizens United*, which was about *corporate* independent expenditures. Individuals could already expend unlimited sums on independent expenditures before *Citizens United*, see, e.g., *Leake*, 525 F.3d at 292-96, and basing the constitutionality of corporations' free speech on what individuals do would be illogical and unconstitutional.

For another thing, "huge sums" being spent for *independent expenditures* do not involve any cognizable corruption. Only transactions involving a quid-pro-quo-corruption risk pose a cognizable corruption risk. *Citizens United*, 130 S.Ct. at 909-10. Influence, gratitude, or access are not corruption. *Id.* at 910-11. Nor is there any corruption—anti-distortion or other—inherent in the corporate form. *Id.* at 904-08. And there is no evidence that there is a problem with purportedly independent expenditures not actually being independent, as required under federal law and FEC rules.<sup>9</sup> If they were in fact not independent,

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<sup>8</sup> (...continued)

takes-aim-at-corporate-donors-to-super-pacs/).

<sup>9</sup> Whether an expenditure is for a "coordinated communication" is governed by 11 C.F.R. 109.21, which sets out precise content and conduct standards that must both be met for a communication to be deemed a coordinated communication. There are specific provisions governing the use of common vendors, former employees, or independent contractors, along with a "safe harbor" by use of a firewall to permit some of these entities to be used, for example, by candidates and advocacy groups without coordination of the

(continued...)

which is a factual and enforcement issue, then they would rightly be regulated as *contributions* subject to contribution limits to deal with any quid-pro-quo-corruption risk.

Finally, consider what the Montana Supreme Court relied on as justifying facts, and what Justices Ginsburg and Breyer suggested as relevant facts. Is this Court going to limit the right of speakers to engage in core political speech because they spend huge sums in doing so? Or because the state they happen to be in had corruption problems, or a corporation employed a lot of people, over a century ago? Or because the same corporation owned a lot of newspapers in the state in the 1950s? Or because the state they happen to be in has few people, a tradition of low-cost elections, or considerable candidate-voter contact?

Examining some of the implications of these arguments shows their problems and error. If free-speech rights depend on population density, then those in large urban areas have more First Amendment protection than those in suburban and rural areas. If free-speech rights depend on how much candidates spent to contact voters in the past, then would-be speakers are at the mercy of past candidate spending

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\* (...continued)

communication. *Id.* Despite considerable speculation in the media about possible coordination between candidates and super PACs, there has not been evidence of actual violation of these rules that are complex and likely not understood by non-specialists. In any event, if a communication is coordinated under the cited provision, it is treated as an in-kind contribution.



for their speech rights. If free-speech rights depend on whether long-past governments have been corrupt, then present-day speakers are at the mercy of things they cannot change and deprived of rights for things they did not do. If engaging in legal, protected speech can be corrupting if one does a lot of it, what does it mean to have a right to speak, and who decides when core political speech becomes too much for the government to permit?

In sum, none of this Court's criteria for reconsidering precedents justifies reconsidering *Citizens United*. And reconsideration based on the facts proposed for limiting core political speech would pose grave constitutional dangers to free speech and association. Consequently, summary reversal is appropriate.

The State, in its Opposition to the Corporations' stay application, argued against summary reversal, based on "due respect for . . . sister supreme courts in the states, all of whom are also 'bound by Oath or Affirmation, to support this Constitution.'" Opp'n 9-10 (quoting U.S. Const. art. VI, ¶ 3). And the State argued that the Corporations' "claim that the decision below is 'an obvious, blatant disregard of [the court's] duty to follow this Court's decisions,'" "can only be true if the facts are irrelevant." Opp'n 10 (citation omitted).

That is precisely the point. The facts *are* irrelevant. The core holding of *Citizens United*, reaffirming *Buckley*, is that the independence of independent expenditures means that they pose no cognizable quid-pro-quo-corruption risk and no other cognizable governmental interest justifies banning corporate

independent expenditures. *See Citizens United*, 130 S.Ct. at 908-11. Thus, the Montana Supreme Court's decision constitutes an attempt to force the reconsideration of *Citizens United* simply because it disagrees with the opinion. That effort should be rejected summarily. "Summary reversal is a strong, clear statement of the majority's commitment to its prior ruling, and the impropriety of the Montana Supreme Court's failure to follow the decision's clear implications." Tom Goldstein, "The Supreme Court, *Citizens United* II, and the November Election," SCOTUSblog (Feb. 18, 2012) (available at <http://www.scotusblog.com/2012/02/the-supreme-court-citizens-united-ii-and-the-november-election/>). *See Kaup v. Texas*, 538 U.S. 626 (2003) (per curiam); *Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam); *New Mexico v. Reed*, 524 U.S. 151 (1998) (per curiam); *Greene v. Georgia*, 519 U.S. 145 (1996) (per curiam); *Trevino v. Texas*, 503 U.S. 562 (1992) (per curiam). *See also Ashland Oil, Inc. v. Tax Commissioner of West Virginia*, 497 U.S. 916 (1990) (per curiam); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam); *Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (per curiam); *Connaly v. Georgia*, 429 U.S. 245 (1977) (per curiam).

Thus, this case is one of great importance because it involves four vitally important issues. As a result, the petition should be granted and the decision below summarily reversed.

### Conclusion

"[I]f the Supreme Court countenances [the Montana Supreme] Court's approach . . . there shortly will be nothing left of *Citizens United* at the state



level. . . . [T]he . . . decision will be 'state-lawed' into oblivion." App.48a (Nelson, J., dissenting). To avoid this result, the Court should grant this petition.

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March 26, 2012

## **Appendix**

**FILED**  
**December 30, 2011**  
**Ed Smith**  
**Clerk of the Supreme Court**  
**State of Montana**

**DA11-0081**  
**IN THE SUPREME COURT OF THE**  
**STATE OF MONTANA**  
**2011 MT 328**

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**WESTERN TRADITION PARTNERSHIP, INC.,**  
**a corporation registered in the State of Montana,**  
**and CHAMPION PAINTING, INC., a Montana**  
**corporation, MONTANA SHOOTING SPORTS**  
**ASSOCIATION, INC., a Montana corporation,**  
**Plaintiffs, Appellees and**  
**Cross-Appellants,**

**v.**

**ATTORNEY GENERAL of the State of Montana,**  
**and COMMISSIONER OF THE COMMISSION**  
**FOR POLITICAL PRACTICES,**  
**Defendants and Appellants.**

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**APPEAL FROM: District Court of the First Judi-**  
**cial District, In and For the**  
**County of Lewis and Clark,**  
**Cause No. BDV 10-238**  
**Hon. Jeffrey M. Sherlock, Presid-**  
**ing Judge**

**COUNSEL OF RECORD:****For Appellants:**

**Steve Bullock** (argued), Montana Attorney General; **Anthony Johnstone**, Solicitor, **James P. Molloy**, Assistant Attorney General, Helena, Montana

**For Appellees:**

**Margot E. Barg** (argued); **Wittich Law Firm, P.C.**, Bozeman, Montana

**For Amici Curiae:**

**Amy Poehling Eddy**; **Bottomly, Eddy & Sandler**, Kalispell, Montana (for former Montana Supreme Court Justices **William E. Hunt, Sr.**, **W. William Leaphart**, **James M. Regnier**, **Terry N. Trieweiler** and **John Warner**)

**Lawrence A. Anderson**, Attorney at Law, Great Falls, Montana (for **MTLA**, Montana Conservation Voters, Montanans for Corporate Accountability, and Montana League of Rural Voters)

**Elizabeth L. Griffing**, Attorney at Law; **Erin Kraft**, Clinic Student, University of Montana, Missoula, Montana (for **ACLU of Montana Foundation**)

**Jonathan Motl**; **Morrison Motl & Sherwood**, Helena, Montana **Jeffrey D. Clements**, **Clements Law Office, LLC**, Concord, Massachusetts (for **Free Speech for People**; **American Sustainable Business Council**; **Novak and Novack, Inc.**, d/b/a **Mike's Thriftway**; **Home Resource, Inc.**, and **The American Independent Business**

Alliance)

Mark Mackin, Attorney at Law, Helena, Montana (for Montana Public Interest Research Group and Peoples Power League)

Karl J. Englund, Karl J. Englund, P.C., Missoula, Montana; Karl J. Sandstrom, Perkins Coie LLP, Washington, D.C. Michael T. Liburdi, James A. Ahlers, Jerica L. Peters, Perkins Coie LLP, Phoenix, Arizona (for Domini Social Investments LLC; Trillium Asset Management Corporation; Newground Social Investment; Interfaith Center On Corporate Responsibility; Harrington Investments, Inc.; The Sustainability Group of Loring, Wolcott & Coolidge; Calvert Asset Management Company, Inc.; The Christopher Reynolds Foundation, Inc.; and Walden Asset Management, a Division of Boston Trust & Investment Management Company)

Lee Bruner, Attorney at Law, Butte, Montana[,] Allen Dickerson, Attorney at Law, Alexandria, Virginia (for Center for Competitive Politics)

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Argued and Submitted: September 21, 2011

Decided: December 30, 2011

Filed:

[/s/]

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 The Attorney General of Montana and the Commissioner of Political Practices appeal from the District Court's Order on Cross-Motions for Summary Judgment filed October 18, 2010. We reverse.

## **PROCEDURAL AND FACTUAL BACKGROUND**

¶2 Western Tradition Partnership (WTP), Champion Painting and Montana Shooting Sports Foundation (MSSF) sued the Montana Attorney General and the Commissioner of Political Practices seeking a declaration that § 13-35-227(1), MCA, violated their freedom of speech protected by the United States and Montana Constitutions by prohibiting political expenditures by corporations on behalf of or opposing candidates for public office. The parties filed cross-motions for summary judgment along with briefs and supporting materials. The District Court declared the statute unconstitutional, granted summary judgment for the plaintiffs and denied summary judgment to the State defendants. The District Court enjoined enforcement of the statute and denied the motion of Champion and MSSF for an award of attorney fees. The State appeals the order of summary judgment in favor of the plaintiffs, and Champion and MSSF cross-appeal from the denial of their request for attorney fees.

## **STANDARDS OF REVIEW**

¶3 This Court reviews a district court's decision on summary judgment using the same standards as the district court under M. R. Civ. P. 56. Where there are cross motions for summary judgment and the district

court is not called upon to resolve factual issues, but only to draw conclusions of law, we review to determine whether those conclusions are correct. *Bud-Kal v. City of Kalispell*, 2009 MT 93, ¶ 15, 350 Mont. 25, 204 P.3d 738. Accordingly, a moving party is entitled to summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Town & Country Foods v. City of Bozeman*, 2009 MT 72, ¶ 12, 349 Mont. 453, 203 P.3d 1283. Statutes enjoy a presumption of constitutionality, and a decision on the constitutionality of a statute is subject to plenary review. *City of Billings v. Albert*, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828.

### DISCUSSION

¶4 Section 13-35-227, MCA, was originally enacted as an initiative by the Montana voters in 1912. It provides:

(1) A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.

(2) A person, candidate or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee or member of the corporation.



(4) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

Section 13-37-128, MCA, provides the sanction for a violation of § 13-35-227, MCA, and allows the Commissioner of Political Practices to recover a civil penalty up to \$500 or triple the amount of the unlawful expenditure. A corporation may establish a separate segregated fund called a political committee or PAC to make political expenditures "if the fund consists of only voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation. [sic] Section 13-35-227(3), MCA. Montana law requires that all political communications must include the name and address of the person or entity that paid for the communication. Section 13-35-225, MCA.

¶5 Champion Painting, Inc., is incorporated under the laws of Montana. It is a single proprietor painting and drywall business with no employees or members, and its sole shareholder is Kenneth Champion. It is the only business corporation in this action. Mr. Champion is personally active in county and state politics, supporting and opposing candidates through blogs, letters to the editor, and speeches. Champion states that he wants to speak on political issues as a spokesman for his corporation and wants to spend corporation funds to independently support or oppose candidates. He believes that doing so would be prohibited by § 13-35-227(1), MCA.

¶6 MSSA is a voluntary association of persons who support and promote firearm safety, shooting sports, education, shooting facilities and Second Amend-

ment rights. It was incorporated in 1990 to provide liability shelter for its officers and directors. It has no employees or shareholders and its funding comes primarily from member dues and donations from other organizations. MSSA is led by its founder Gary Marbut, who is active in Montana politics on behalf of the Association. He and the MSSA have operated a political committee under Montana law for over ten years and publicize its grading and endorsements of political candidates in state and national elections. Marbut believes that the MSSA "has a political presence in Montana, and a political reputation that carries some weight with the Montana public by virtue of our long history of activism in Montana." Nonetheless Marbut wants to use MSSA member dues to support or oppose candidates and believes that § 13-35-227(1), MCA, prohibits MSSA from doing so.

¶7 Western Tradition Partnership is an entity incorporated in Colorado in 2008 and registered to do business in Montana. WTP reveals no more than that about itself in this case. Evidence presented by the State in District Court and not refuted by WTP is that its purpose is to act as a conduit of funds for persons and entities including corporations who want to spend money anonymously to influence Montana elections. WTP seeks to make unlimited expenditures in Montana elections from these anonymous funding sources. WTP's operation is premised on the fact, or at least the assumption, that its independent expenditures have a determinative influence on the outcome of elections in Montana.

¶8 Upon the plaintiffs' motion for summary judg-

ment, the District Court considered whether § 13-35-227(1), MCA, violates the First Amendment to the United States Constitution to the extent that it restricts WTP, MSSA or Champion from making independent corporate expenditures on behalf of candidates.<sup>1</sup> The District Court applied *Citizens United v. F.E.C.*, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) and determined that § 13-35-227(1), MCA, impacts the corporations' political speech protected by the United States Constitution. The District Court then considered whether the State had demonstrated a compelling interest for the restriction on speech, and whether the restriction is narrowly tailored to achieve that interest. While it answered both questions in the negative, the District Court did not conduct a detailed analysis of the compelling interest question. Instead, it concluded that "*Citizens United* is unequivocal: the government may not prohibit independent and indirect corporate expenditures on political speech." (Quoting *Minn. Chamber of Comm. v. Gaertner*, 710 F. Supp. 2d 868 (D. Minn. 2010)). The District Court specifically did not address whether § 13-35-227, MCA, violated the Montana Constitution, and further noted that the decision had "no effect on direct corporate contributions to candidates or to any existing or future disclosure laws that might be enacted." Those aspects of Montana law are therefore not at issue in this case.

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<sup>1</sup> Under Montana law corporations are allowed to make independent expenditures on ballot issues. *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000).

¶9 We take note that Western Tradition appears to be engaged in a multi-front attack on both contribution restrictions and the transparency that accompanies campaign disclosure requirements. In addition to this case, it is currently engaged in separate litigation in the same District Court involving the Montana laws on campaign spending disclosures. *Western Tradition Partnership v. Gallik*, Cause BDV 2010-1120 (Mont. 1st Jud. Dist. Ct.).<sup>2</sup> In another action filed in United States District Court in September, 2011, WTP, under its new name of American Tradition Partnership, and with others, challenges the constitutionality of most of the limits and disclosure requirements contained in § 13-37-216, MCA. *Lair, et al., v. Gallik, et al.*, United States District Court for the District of Montana, Billings Division. Ironically, perhaps, WTP argued in the District Court and in its oral presentation to this Court on appeal that their compliance with these same disclosure laws that it now seeks to invalidate should remedy any concerns regarding the potential corrupting influence of its unlimited corporate expenditures.

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<sup>2</sup> In a decision in October, 2010, the Montana Commissioner of Political Practices found that WTP had created a sham organization through which to channel campaign funds, and that its arguments to the contrary were deceptive. The Commissioner further concluded that WTP's failure to register as a political committee and to disclose the true source and disposition of the funds it raised "frustrates the purpose of Montana's Campaign Finance and Practices Act [and] raises the specter of corruption of the electoral process. . . ."

¶10 The District Court erroneously construed and applied the *Citizens United* case. That case considered the constitutionality of Federal statutes and regulations that prohibited corporations from “electioneering” (making a communication that refers to a clearly identified candidate for Federal office) within 30 days of a primary election or 60 days of a general election.

¶11 *Citizens United* was a case decided upon its facts, and involved “unique and complex” rules that affected 71 distinct entities and included separate rules for 33 different types of speech in Federal elections. Since 1975, the Federal Election Commission adopted 568 pages of regulations, 1,278 pages of explanatory materials, and 1,771 advisory opinions to implement and enforce the Federal law. The FEC adopted a two-part, 11-factor test in response to the holding in a single Supreme Court decision. If parties want to avoid litigation and possible penalties they must either refrain from political speech or seek an advisory opinion. All of this, the Supreme Court found, allows the FEC to “select what political speech is safe for public consumption by applying ambiguous tests.” *Citizens United*, 130 S. Ct. at 895-96. The Court determined that the law was “an outright ban, backed by criminal sanctions.” *Citizens United*, 130 S. Ct. at 897.

¶12 A premise of *Citizens United* was that First Amendment protections extend to corporations. *Citizens United*, 130 S. Ct. at 899. The Court additionally determined that the option for a corporation to spend through a separate PAC was not a sufficient alternative because of the burdensome, extensive,



and expensive Federal regulations that applied. The Federal law allowed corporations to form a separate segregated fund (sometimes called a political action committee or PAC) as long as the funds were limited to donations from stockholders or, in the case of unions, its members. The Court found the regulations governing the organization of PACs to be "onerous" restrictions that might not allow a corporation to establish a PAC in time to make its views known in a current campaign. *Citizens United*, 130 S. Ct. at 898. Therefore, because the Federal laws and regulations severely restricted speech, their constitutionality could be maintained only upon a showing that they further a compelling governmental interest and are narrowly tailored to achieve that interest. *Citizens United*, 130 S. Ct. at 898.

¶13 The Court found that the Government did not claim that corporate expenditures had actually corrupted the political process and concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909. However, if elected officials do succumb to improper influences from independent expenditures, "then surely there is cause for concern." *Citizens United*, 130 S. Ct. at 911.

¶14 The Court determined that the government had not provided a compelling interest to justify the speech restrictions at issue. The Court considered and rejected arguments that preventing the distorting effect of large expenditures; preventing corruption or the appearance of corruption; or protection of dissenting shareholders were sufficient interests to



support the Federal restrictions. Therefore, finding no compelling interest for the Federal restrictions on corporate political speech through independent expenditures, the Court found an impermissible contravention of the First Amendment. *Citizens United*, 130 S. Ct. at 911.

¶15 While *Citizens United* was decided under its facts or lack of facts,<sup>3</sup> it applied the long-standing rule that restrictions upon speech are not per se unlawful, but rather may be upheld if the government demonstrates a sufficiently strong interest. *Citizens United*, 130 S. Ct. at 898; *Federal Election Comm. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251-52, 107 S. Ct. 616, 624 (1986); *Bluman v. Federal Election Commission*, 2011 U.S. Dist. LEXIS 86971 (D. D.C. 2011) (upholding Federal ban against campaign contributions by foreign citizens). The Supreme Court in *Citizens United* applied the highest level of scrutiny to the restrictions at issue there, requiring the government to demonstrate a compelling interest, although the level of evidence needed to satisfy heightened scrutiny will vary with the “novelty and plausibility of the justification raised.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391, 120 S. Ct. 897, 906 (2000). Therefore, the factual record before a court is critical to determining the validity of a governmental provision restricting speech. The Dissents assert that *Citizens United* holds unequivocally that no sufficient government interest justifies limits on political speech. We

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<sup>3</sup> The Court noted, for example, the “scant evidence” of the effects of independent expenditures. *Citizens United*, 130 S. Ct. at 910.

disagree. The Supreme Court held that laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the law furthers a compelling state interest and is narrowly tailored to that interest. The Court, citing *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 464, 127 S. Ct. 2652, 2663-64 (2007), clearly endorsed an analysis of restrictions on speech, placing the burden upon the government to establish a compelling interest. *Citizens United*, 130 S. Ct. at 898. Here the government met that burden.

¶16 In this case both sides moved the District Court for summary judgment. The WTP parties conducted no discovery in the case and presented two brief affidavits, one from the MSSF and one from Mr. Champion in support of summary judgment. The State presented a more extensive record consisting of the deposition transcripts of both Mr. Champion and Mr. Marbut of the MSSF, along with seven affidavits and attached exhibits. The plaintiffs did not contest any of this evidence. Nonetheless, the District Court failed to give adequate consideration to the record in determining whether the State had demonstrated a compelling interest for the restrictions imposed by § 13-35-227(1), MCA. We do so now because, unlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history.

¶17 First, the depositions of Marbut (on behalf of MSSF) and Champion demonstrate that both have been very active politically in Montana on a range of issues that concern them. Neither could demonstrate any material way in which Montana law hindered or

censored their political activity or speech. Mr. Marbut, on behalf of MSSF, has been an active fixture in Montana politics and in the legislative process for many years. He stated that he believed that while Montana law allowed MSSF to obtain and spend donations from other organizations on political activities, it did not allow MSSF to use dues paid by its members for the same purposes. No such distinction appears in Montana law, and the affidavit of the Commissioner of Political Practices affirms his construction of Montana law that it places no such restriction on MSSF. MSSF, therefore, failed to demonstrate that its speech was impaired by the statute.

¶18 Similarly, Mr. Champion described his many political activities both on a local and state level. He affirmed that he regularly speaks, blogs, and meets with others, and has run for public office. His complaint was that he believed that Montana law prohibits him from telling his audiences and readers that his company, Champion Painting, also supports his views. Mr. Champion believes that a candidate endorsement by "Champion Painting, Inc." would be more persuasive than his personal endorsement, and that if his business spends money on political events he will enjoy "tax benefits." However, in Champion's case he is the sole shareholder and derives his livelihood from the money he pays himself from the corporation. While the statute forbids the expenditure of Champion Painting's corporate funds to support or oppose candidates, the burden upon Kenneth Champion, as a sole shareholder, to establish a political committee to advocate for his corpora-

tion's interests and expend funds that he will decide to contribute, are particularly minimal. We conclude, under these facts, Champion's political speech was similarly not materially impacted by the statute.

¶19 WTP, as noted, has been terse in its explanations of its organization, funding, activities, and intent. It claims to be a foreign corporation but it is not a business corporation. Its purpose, according to un-rebutted evidence submitted to the District Court by the State, is to solicit and anonymously spend the funds of other corporations, individuals and entities to influence the outcome of Montana elections. In a promotional presentation directed to potential donors, WTP represented:

There's no limit to how much you can give. As you know, Montana has very strict limits on contributions to candidates, but there is no limit to how much you can give to this program. You can give whatever you're comfortable with and make as big of an impact as you wish.

Finally, we're not required to report the name or the amount of any contribution that we receive. So, if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible. *The only thing we plan on reporting is our success to contributors like you who can see the benefits of a program like this. You can just sit back on election night and see what a difference you've made.*

Western Tradition Partnership, 2010 Election Year



*Program Executive Briefing.* (Emphasis added.)

¶20 Organizations like WTP that act as conduits for anonymous spending by others represent a threat to the “political marketplace.” *Mass. Citizens for Life, Inc.*, 479 U.S. at 264, 107 S. Ct. at 631. Echoing that theme, the State presented evidence that WTP has operated in disregard for and without complying with Montana law, unlike MSSF and Champion. Because WTP has not disclosed its operation, it is difficult to determine how it might be impacted by § 13-35-227(1), MCA, but given the evidence presented below we will assume there is a direct impact.

¶21 Second, a material factual distinction between the present case and *Citizens United* is the extent of the regulatory burden imposed by the challenged law. As noted above, the Court in *Citizens United* emphasized the length, complexity and ambiguity of the Federal restrictions, including the power of the FEC to determine what speech is “safe for public consumption,” and the difficulty of establishing a PAC as an alternative to direct corporate spending. In contrast, under Montana law a political committee can be formed and maintained by filing simple and straight-forward forms or reports. (See e.g. §§ 13-37-201 and -210; 13-35-402, MCA.) Mr. Marbut in his deposition described that MSSF has established its own political committees and used them to actively participate in the Montana political process over a period of years. The evidence submitted by the State in the District Court similarly demonstrates that corporations, through their political committees organized under Montana law, are and have been a substantial presence and active participants in

Montana politics. The many lobbyists and political committees who participate in each session of the Montana Legislature bear witness. Under the undisputed facts here, the political committee is an easily implemented and effective alternative to direct corporate spending for engaging in political speech. This alternative is available to any corporation in Montana, and to MSSF and Champion, as well as WTP should they choose to comply with existing Montana law. In the case of MSSF the evidence shows that it has in fact effectively used the political committee form for years and there is no showing that it could not continue to do so.

¶22 Third, the Montana law at issue in this case cannot be understood outside the context of the time and place it was enacted, during the early twentieth century. (Montana became a state in 1889.) Those tumultuous years were marked by rough contests for political and economic domination primarily in the mining center of Butte, between mining and industrial enterprises controlled by foreign trusts or corporations. These disputes had profound long-term impacts on the entire State, including issues regarding the judiciary, the location of the state capitol, the procedure for election of U.S. Senators, and the ownership and control of virtually all media outlets in the State.

¶23 Examples of well-financed corruption abound. In the fight over mineral rights between entrepreneur F. Augustus Heinze and the Anaconda Company, then controlled by Standard Oil, Heinze managed to control the two State judges in Butte, who routinely decided cases in his favor. K. Ross



Toole, *Montana, An Uncommon Land*, 196-99 (Univ. of Okla. Press 1959) the Butte judges denied being bribed, but one of them admitted that Anaconda representatives had offered him \$250,000 cash to sign an affidavit that Heinze had bribed him. Toole, *Montana, An Uncommon Land*, 204.

¶24 In response to the legal conflicts with Heinze, in 1903 Anaconda/Standard closed down all its industrial and mining operations (but not the many newspapers it controlled), throwing 4/5 of the labor force of Montana out of work. Toole, *Montana, An Uncommon Land*, 206. Its price for sending its employees back to work was that the Governor call a special session of the Legislature to enact a measure that would allow Anaconda to avoid having to litigate in front of the Butte judges. The Governor and Legislature capitulated and the statute survives. See e.g. *Patrick v. State*, 2011 MT 169, ¶¶ 17-23, 361 Mont. 204, 257 P.3d 365.

¶25 W. A. Clark, who had amassed a fortune from the industrial operations in Butte, set his sights on the United States Senate. In 1899, in the wake of a large number of suddenly affluent members, the Montana Legislature elected Clark to the U. S. Senate. Clark admitted to spending \$272,000 in the effort and the estimated expense was over \$400,000. Complaints of Clark's bribery of the Montana Legislature led to an investigation by the U. S. Senate in 1900. The Senate investigating committee concluded that Clark had won his seat through bribery and unseated him. The Senate committee "expressed horror at the amount of money which had been poured into politics in Montana elections . . . and

expressed its concern with respect to the general aura of corruption in Montana." Toole, *Montana, An Uncommon Land*, 186-94.

¶26 In a demonstration of extraordinary boldness, Clark returned to Montana, caused the Governor to leave the state on a ruse and, with assistance of the supportive Lt. Governor, won appointment to the very U. S. Senate seat that had just been denied him. Toole, *Montana, An Uncommon Land*, 192-93. When the Senate threatened to investigate and unseat Clark a second time, he resigned. Clark eventually won his Senate seat after spending enough on political campaigns to seat a Montana Legislature favorable to his candidacy.

¶27 After the Anaconda Company cleared itself of opposition from Heinze and others, it controlled 90% of the press in the state and a majority of the legislature. C. B. Glasscock, *The War of the Copper Kings*, 290 (Grosset & Dunlap, N.Y. 1935). By 1915 the company, after having acquired all of Clark's holdings as well as many others, "clearly dominated the Montana economy and political order . . . [and] local folks now found themselves locked in the grip of a corporation controlled from Wall Street and insensitive to their concerns." Michael Malone and Richard Roeder, *Montana, a History of Two Centuries*, 176 (Univ. of Wash. Press, Seattle 1976). Even at that time it was evident that industrial corporations controlled the state "thus converting the state government into a political instrument for the furthering and accomplishment of legislation and the execution of laws favorable to the absentee stockholders of the large corporations and inimical to the economic interests

of the wage earning and farming classes who constitute by far the larger percentage of the population in Montana." Helen Fisk Sanders, *History of Montana*, Vol. 1, 429-30 (Lewis Pub. Co. 1913).

¶28 In 1900 Clark himself testified in the United States Senate that "[m]any people have become so indifferent to voting" in Montana as a result of the "large sums of money that have been expended in the state. . . ." Toole, *Montana, An Uncommon Land*, 184-85. This naked corporate manipulation of the very government (Governor and Legislature) of the State ultimately resulted in populist reforms that are still part of Montana law. In 1906 the people voted to amend the state Constitution to allow for voter initiatives. Not long thereafter, in 1906 this new initiative power was used to enact reforms including primary elections to choose political candidates; the direct election of United States Senators; and the Corrupt Practices Act, part of which survives as § 13-35-227, MCA, at issue in this case.

¶29 The State of Montana was still contending with corporate domination even in the mid-20th century. For example, the Anaconda Company maintained controlling ownership of all but one of Montana's major newspapers until 1959. Writing in 1959, historian K. Ross Toole so noted and described the state:

Today the influence of the Anaconda Company in the state legislature is unspectacular but very great. It has been a long time since the company showed the mailed fist. But no informed person denies its influence or the fact that the basic use to which it is put is to main-

tain the status quo—to keep taxes down, not to rock the boat. Few of the company personnel either in Butte or in New York remember F. Augustus Heinze, or even for that matter, [U. S. Senator] Joseph M. Dixon, but it would be foolish for anyone to deny that the pervasive influence of the Anaconda Company in Montana politics is part and parcel of the Montana heritage.

Toole, *Montana, An Uncommon Land*, 244. A study of Montana in the early 1970s concluded that corporate influence of the Anaconda Company had been "replaced by a corporate power structure, with interlocked directorates, the same law firms and common business interests" among the Anaconda Company, Montana Power Company, Burlington Northern Railway and the First Bank System. Malone and Roeder, *Montana, a History of Two Centuries*, 290. History professor Dr. Harry Fritz, in his affidavit presented in the District Court, affirmed that the "dangers of corporate influence remain in Montana" because the resources upon which its economy depends in turn depend upon distant markets. He affirmed: "What was true a century ago is as true today: distant corporate interests mean that corporate dominated campaigns will only work 'in the essential interest of outsiders with local interests a very secondary consideration.'" While specific corporate interests come and go in Montana, they are always present. Montana's mineral wealth, for example, has historically been exported from the State, and that is still true today. *Commonwealth Edison Co. v. State of Montana*, 189 Mont. 191, 196,

615 P.2d 847, 850 (1980), *aff'd*, 453 U.S. 609, 101 S. Ct. 2946. The corporate power that can be exerted with unlimited political spending is still a vital interest to the people of Montana.

¶30 Furthermore, in the evidence presented below the State demonstrated aptly how even small expenditures of money can impact Montana elections. The State submitted affidavits from two respected and experienced politicians and public servants. Bob Brown, a Republican, served in the Montana House of Representative, in the Montana Senate, as the Montana Secretary of State and as an unsuccessful candidate for Governor. He retired in 2010 as a Senior Fellow at the Center for the Rocky Mountain West and the Mansfield Center, at the University of Montana. Mike Cooney, a Democrat, served in the Montana House of Representatives, in the Montana Senate, as the Montana Secretary of State, and also as an unsuccessful candidate for Governor. Both affirmed that Montana, with its small population, enjoys political campaigns marked by person-to-person contact and a low cost of advertising compared to other states. They affirmed that allowing unlimited independent expenditures of corporate money into the Montana political process would drastically change campaigning by shifting the emphasis to raising funds.

¶31 Cooney, for example, ran his first state legislative campaign for \$750 as a "grassroots" effort that he believed could have been derailed by an opposing expenditure of even a couple of thousand dollars. Brown affirmed that Montana politics are more susceptible to corruption than Federal campaigns, and



that infusions of large amounts of corporate independent expenditure on just media coverage "could accomplish the same type of corruption of Montana politics as that which led to the enactment of" § 13-35-227, MCA. Cooney recounted his experience from his most recent campaign when he found that voters were concerned that they "didn't really count" in the political process unless they can make a material financial contribution, and that special interests therefore hold sway. This is much the same sentiment described by W. A. Clark to the United States Senate committee over a century ago, quoted above.

¶32 The State also presented the affidavit of Edwin Bender of the National Institute on Money in State Politics. He confirmed that under Montana law corporations can now make unlimited contributions (in amount) for independent expenditures from their corporate PACs to support or oppose candidates, directly to ballot measure committees, and to support or oppose ballot measures, and can make unlimited expenditures on lobbyists. Corporations can make contributions with the same limits as all donors from their PACs to candidates and to party committees. Bender also affirmed the low cost of political races in Montana, in comparison to other states,<sup>4</sup> with all legislative and statewide candidates for office raising a total of around \$7 million in 2008. In that year the average candidate for the Montana House raised \$7,475 and the average candidate for the Montana Senate raised \$13,299. This makes it possible for

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<sup>4</sup> Montana is the fourth largest state in size, covering over 145,000 square miles, and has a population less than one million people.



direct political spending by corporations to significantly affect the outcome of elections.

¶33 Bender also affirmed that studies of election spending in the United States show that the percentage of campaign contributions from individual voters drops sharply from 48% in states with restrictions on corporate spending to 23% in states without. Evidence presented in the District Court showed that in recent years in Montana, corporate independent spending on ballot issues has far exceeded spending from other sources. He provided an extensive 2010 joint study by the Hofstra University School of Law, the Brandeis Center at the NYU School of Law and the National Institute on Money in State Politics that concluded that polling shows that 3 of 4 Americans believe that campaign contributions affect judicial decisions in states where judges are elected. *The New Politics of Judicial Elections 2009-2009*, Charles Hall ed., Justice at Stake Campaign, 2010.

¶34 Laws that impact speech in some way must be evaluated by using the proper level of scrutiny. This is determined by the type of speech that the law affects and the type of burden that the law imposes. *Davis v. Fed. Election Comm.*, 554 U.S. 724, 737, 128 S.Ct. 2759, 2770 (2008). Laws that place severe burdens on fully protected speech are subject to strict scrutiny, *Arizona Free Enterprise Club v. Bennett*, \_\_ U.S. \_\_, 131 S. Ct. 2806, 2816-17 (2011), while laws that place only a minimal burden or that apply to speech that is not fully protected receive intermediate scrutiny. *Davis*, 554 U.S. at 737, 128 S. Ct. at 2771.

¶35 Montana law has long incorporated a require-

ment of a compelling state interest in evaluating cases involving claims that governmental action infringes upon constitutional rights. The Montana Constitution, Art. 2 § 10, expressly incorporates the standard for evaluating issues affecting the right of individual privacy. *Montana Hum. Rights Div. v. City of Billings*, 199 Mont. 434, 439-40, 649 P.2d 1283, 1286 (1982); *St. James Comm. Hosp. v. District Court*, 2003 MT 261, ¶ 4, 317 Mont. 419, 77 P.3d 534. Under Montana law the government must demonstrate a compelling interest when it intrudes on a fundamental right, and determination of a compelling interest is a question of law. *State v. Pastos*, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994).

¶36 Based upon the background of § 13-35-227(1), MCA, the State of Montana, or more accurately its voters, clearly had a compelling interest to enact the challenged statute in 1912. At that time the State of Montana and its government were operating under a mere shell of legal authority, and the real social and political power was wielded by powerful corporate managers to further their own business interests. The voters had more than enough of the corrupt practices and heavy-handed influence asserted by the special interests controlling Montana's political institutions. Bribery of public officials and unlimited campaign spending by the mining interests were commonplace and well known to the public. Referring to W. A. Clark, but describing the general state of affairs in Montana, Mark Twain wrote in 1907 that Clark "is said to have bought legislatures and judges as other men buy food and raiment. By his example he has so excused and so sweetened corrup-

tion that in Montana it no longer has an offensive smell." Mark Twain, *Mark Twain in Eruption*, 72 (Harper & Bros. 1940).

¶37 The question then, is when in the last 99 years did Montana lose the power or interest sufficient to support the statute, if it ever did. If the statute has worked to preserve a degree of political and social autonomy is the State required to throw away its protections because the shadowy backers of WTP seek to promote their interests? Does a state have to repeal or invalidate its murder prohibition if the homicide rate declines? We think not. Issues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government. Clearly Montana has unique and compelling interests to protect through preservation of this statute.

¶38 While Montana has a clear interest in preserving the integrity of its electoral process, it also has an interest in encouraging the full participation of the Montana electorate. The unrefuted evidence submitted by the State in the District Court through the affidavit of Edwin Bender demonstrates that individual voter contributions are diminished from 48% of the total raised by candidates in states where a corporate spending ban has been in place to 23% of the total raised by candidates in states that permit unlimited corporate spending. The point is illustrative of Montana, a state where citizens generally

support candidates with modest campaign donations. In the case of ballot issues, where corporations may make unlimited donations, the characteristics of donors are markedly different from those who give to candidates. In 2004, for example, 97 institutional donors gave 95% of the total money raised in ballot initiative campaigns, while 760 individual donors accounted for the remaining 5%. Similarly, in 2008, 34 institutional donors gave 95% of the total money donated to ballot campaigns. Moreover, unlimited corporate money would irrevocably change the dynamic of local Montana political office races, which have historically been characterized by the low-dollar, broadbased campaigns run by Montana candidates. At present, the individual contribution limit for Montana House, Senate and District Court races is \$160, and for Supreme Court elections it is \$310. Section 13-37-216, MCA, as adjusted as provided in (4). With the infusion of unlimited corporate money in support of or opposition to a targeted candidate, the average citizen candidate would be unable to compete against the corporate-sponsored candidate, and Montana citizens, who for over 100 years have made their modest election contributions meaningfully count would be effectively shut out of the process.

¶39 Montana also has a compelling interest in protecting and preserving its system of elected judges. In this State, the people elect the Justices of the Supreme Court, the Judges of the District Courts, and most lower court judges as well. Mont. Const. art. VII, § 8; § 3-2-101, MCA; and § 3-5-201, MCA. Judicial elections are nonpartisan. Section 13-

14-111, MCA. When only an incumbent is running for a judicial seat, the voters can approve or reject the candidate. Mont. Const. art. VII, § 8 (e).

¶40 The people of the State of Montana have a continuing and compelling interest in, and a constitutional right to, an independent, fair and impartial judiciary. The State has a concomitant interest in preserving the appearance of judicial propriety and independence so as to maintain the public's trust and confidence. In the present case, the free speech rights of the corporations are no more important than the due process rights of litigants in Montana courts to a fair and independent judiciary, and both are constitutionally protected. The Bill of Rights does not assign priorities as among the rights it guarantees. *Neb. Press Assoc. v. Stuart*, 427 U.S. 539, 561, 96 S. Ct. 2791, 2803 (1976).

¶41 Clearly the impact of unlimited corporate donations creates a dominating impact on the political process and inevitably minimizes the impact of individual citizens. As to candidates for political office, § 13-35-227(1), MCA, is designed to further the compelling interest of the people of Montana in strong voter participation in the process. While corporations have first amendment rights in political speech, they do not have the vote.

¶42 The importance of and compelling interest in an independent judiciary is reflected as a matter of policy in Montana's Code of Judicial Conduct.

An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and



competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society.

Mont. Code of Judicial Conduct, *Preamble*. Montana expects its judges to act to promote “public confidence in the independence, integrity, and impartiality of the judiciary” and to “avoid impropriety and the appearance of impropriety.” Mont. Code of Judicial Conduct, Rule 1.2. Because it is the duty of a judge to make decisions based upon the facts and law of every case, a judge must “to the greatest extent possible, be free and appear to be free from political influence and political pressure.” Mont. Code of Judicial Conduct, Rule 4.2, *Comment* [1]. “Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence.” Mont. Code of Judicial Conduct, Rule 4.2, *Comment* [3].

¶43 The United States Supreme Court has affirmed the importance of judicial integrity and in maintaining public respect for the judiciary.

“Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. *Judicial integrity is, in consequence, a state interest of the highest order.*” [Emphasis added.]

*Caperton v. A. T. Massey Coal Co., Inc.*, 558 U.S. 868, \_\_\_, 129 S. Ct. 2252, 2266-67 (2009) (quoting *Repub-*



*lican Party of Minn. v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002)). The Court also recognizes the importance of state codes of judicial conduct, which “serve to maintain the integrity of the judiciary and the rule of law.” *Caperton*, 558 U.S. at \_\_\_, 129 S. Ct. at 2266. States have a “compelling interest” in preventing judges from activities that “would undermine actual impartiality, as well as its appearance.” *Bauer v. Shepard*, 620 F.3d 704, 711 (7th Cir. 2010) (upholding limits on judges acting in posts of political leadership and delivering political speeches). “The state certainly has a compelling state interest in the public’s trust and confidence in the integrity of our judicial system.” *Simes v. Ark. Judicial Discipline and Disability Comm.*, 247 S.W.3d 876, 882 (Ark. 2007).

¶44 Montana judicial elections would be particularly vulnerable to large levels of independent spending, both in terms of fairness and in terms of the public perception of impartiality. Litigants appearing before a judge elected after a large expenditure of corporate funds could legitimately question whether their due process rights were adversely impacted. In the 2008 contested election for Chief Justice of the Montana Supreme Court, evidence presented by the State in the District Court indicated that the total expenditure for media advertising was about \$60,000. It is clear that an entity like Massey Coal, willing to spend even hundreds of thousands of dollars, much less millions, on a Montana judicial election could effectively drown out all other voices. The historic Heinze-Anaconda conflict noted above illustrates the obvious negative and

corrupting effects of a "bought" judiciary.

¶45 Sandra Day O'Connor recently wrote in her introduction to *The New Politics of Judicial Elections* that the "crisis of confidence in the impartiality of the judiciary is real and growing." The Executive Summary in that same report noted a study of the nation's ten most costly judicial elections shows the extraordinary spending power of "super spender groups," which are mostly corporate funded. Montana is not immune from such influence and has a compelling interest in precluding corporate expenditures on judicial elections based upon its interest in insuring judicial impartiality and integrity, its interest in preserving public confidence in the judiciary and its interest in protecting the due process rights of litigants.<sup>5</sup>

¶46 As discussed above, the statute has no or minimal impact on MSSF and Champion. Because of this minimal impact, the State is not required to demonstrate a compelling interest to support §13-35-227(1), MCA. It is required only to demonstrate the less exacting sufficiently important interest. For the same reasons discussed above with regard to the compelling state interest, the statute is clearly supported by important governmental interests. Therefore, as to MSSF and Champion, it passes constitutional muster as well.

¶47 Finally, § 13-35-227(1), MCA, is narrowly tai-

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<sup>5</sup> The State has additionally argued that it has a compelling interest in protecting the rights of dissenting shareholders who disagree with the political stance of corporate spending. We do not reach that issue because it has not been presented in the factual framework of this case.

lored to meet its objectives. The statute only minimally affects entities like MSSF and Champion. Even if it applies directly to WTP, WTP can still speak through its own political committee/PAC as hundreds of organizations in Montana do on an ongoing basis. Unlike the Federal law PACs considered in *Citizens United*, under Montana law political committees are easy to establish and easy to use to make independent expenditures for political speech. As the Bender affidavit submitted by the State in District Court confirms, corporate PACs can make unlimited independent expenditures on behalf of candidates. The difference then is that under Montana law the PAC has to comply with Montana's disclosure and reporting laws. And as noted earlier, corporations are allowed to contribute to ballot issues in Montana, which is a significant distinction because ballot issues often have a direct impact on corporate business activities within Montana but present less danger of corruptive influences that have concerned Montana voters since 1912. The statute only addresses contributions regarding candidates for state political office.

### CONCLUSION

¶48 *Citizens United* does not compel a conclusion that Montana's law prohibiting independent political expenditures by a corporation related to a candidate is unconstitutional. Rather, applying the principles enunciated in *Citizens United*, it is clear that Montana has a compelling interest to impose the challenged rationally-tailored statutory restrictions. We reverse the District Court and enter summary judgment in favor of the Montana Attorney General and

the Commissioner of Political Practices and against WTP, MSSF and Champion. Consequently, the cross-appeal on the issue of attorney fees is moot.

/S/ MIKE McGRATH

We concur:

/S/ BRIAN MORRIS

/S/ PATRICIA COTTER

/S/ MICHAEL E WHEAT

/S/ JIM RICE

Justice Beth Baker, dissenting.

¶49 I agree with Justice Nelson that we are constrained by *Citizens United* to declare § 13-35-227(1), MCA, unconstitutional to the extent it prohibits independent corporate expenditures for political speech. In my view, the State of Montana made no more compelling a case than that painstakingly presented in the 90-page dissenting opinion of Justice Stevens and emphatically rejected by the majority in *Citizens United*. Though I believe *Citizens United* requires us to affirm the District Court, we must in any event anticipate the consequences should the Court's holding today be reversed. Rather than inventing distinctions in what I fear will be a vain attempt to rescue Montana's Corrupt Practices Act, I would construe the statute in a manner to preserve what remains of its constitutionality and to further the legislature's underlying intent to prevent corruption.

¶50 *Citizens United* holds unequivocally that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corpora-

tions." 130 S. Ct. at 913. Just as unequivocally, however, it allows the government to impose disclaimer and disclosure requirements on political speech because, while such requirements "may burden the ability to speak, . . . they 'impose no ceiling on campaign-related activities,' . . . and 'do not prevent anyone from speaking[.]'" 130 S. Ct. at 914 (citations omitted). Plaintiffs' counsel acknowledged during oral argument that disclosure requirements are the means by which to address the State's compelling interest in preserving the integrity of the election process. And the Amicus Curiae Brief from the Center for Competitive Politics described disclosure mandates as among the "constitutional tools" available to states in the wake of *Citizens United*. In light of *Citizens United*'s clear directive that the State cannot prohibit corporate expenditures, our review and construction of the challenged statute should focus on preserving disclosure requirements as applied to such expenditures in order to protect the overriding interest in preventing corruption.

¶51 This Court attempts to construe statutes in a manner that avoids unconstitutional interpretation. *Oberson v. USDA*, 2007 MT 293, ¶ 14, 339 Mont. 519, 171 P.3d 715. If a law contains both constitutional and unconstitutional provisions, the Court first will examine the legislation to determine if there is a severability clause. *PPL Mont., LLC v. State*, 2010 MT 64, ¶ 131, 355 Mont. 402, 229 P.3d 421 (citing *Finke v. State*, 2003 MT 48, ¶ 25, 314 Mont. 314, 65 P.3d 576). In the absence of such a clause, the Court considers "whether the integrity of [the law] relies upon the unconstitutional provision



or whether the inclusion of [the] provisions acted as inducement to its enactment." *Finke*, ¶ 26. If the unconstitutional provisions are stricken, the law must be complete in itself and still capable of execution in accord with legislative intent. *Finke*, ¶ 26. Though "the presumption is against the mutilation of a statute," *Sheehy v. Pub. Emp. Retirement Div.*, 262 Mont. 129, 142, 864 P.2d 762, 770 (1993), if the offending provisions may be removed without frustrating the purpose or disrupting the integrity of the law, the Court will strike only those provisions of the statute that are unconstitutional. *Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 380-81, 632 P.2d 300, 302 (1981).

¶52 Plaintiffs seek a ruling invalidating subsection (1) of § 13-35-227, MCA. That subsection prohibits a corporation from making "a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." Subsection (2) of the statute, not challenged here, prohibits a person, candidate, or political committee from accepting or receiving a corporate contribution. Subsection (3) of the same statute allows "the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation."

¶53 Section 13-35-227(3), MCA, when read in the context of Montana's overall campaign finance scheme, expresses the legislature's intent to provide citizens and shareholders with information about



sources of funds used in support of candidates and ballot issues. Under *Citizens United*, the State clearly may not require corporate independent expenditures to come from a fund consisting only of "voluntary contributions" as the language of § 13-35-227(3), MCA, now provides. Subsection (1) of the statute still could be preserved by allowing corporate expenditures under that subsection to be made from a "separate segregated fund" as prescribed by subsection (3), without applying the now-invalid requirement that "the funds consist[] only of voluntary contributions."

¶54 I would therefore hold that the Commissioner constitutionally may extend Montana's disclosure and reporting laws to independent expenditures by corporate entities made on behalf of candidates or political committees, just as the Commissioner has done for corporate expenditures on ballot issue campaigns. Without such a holding, and given that the Montana Legislature will not meet in general session prior to the next election, Montana voters may be left in the dark if § 13-35-227(1), MCA, is invalidated by the nation's highest court.

¶55 Applying § 13-35-227(3), MCA, in a constitutionally-permitted fashion to expenditures from a corporate treasury will further the government's interest in disclosure requirements and will not disrupt the statute's integrity. As noted by the Majority, only part of the original Corrupt Practices Act survives in § 13-35-227, MCA. Opinion, ¶ 28. The statute has been amended numerous times in its 100-year history. Subsection (3) was added in 1979. 1979 Mont. Laws ch. 404, 1011. The statute's most

recent modification was in 2003, after federal courts invalidated the law's prohibition against corporate contributions and expenditures in ballot issue campaigns. *Mont. Chamber of Com. v. Argenbright*, 28 F. Supp. 2d 593, 600-01 (D. Mont. 1998), *aff'd*, 226 F.3d 1049, 1052 (9th Cir. 2000). Although neither the original Act nor most of its amendments have included a severability clause, applying the statute in the fashion I suggest is consistent with the *Finke* analysis.

¶56 Through the years, while legislative history is scant, the legislature's palpable intent was to prevent corruption in Montana elections. Opinion, ¶¶ 22-28. Prohibition of corporate contributions has been one means to achieve that goal; disclosure has been another. State Senator Miles Romney, sponsor of the 1975 amendment that first introduced the ban on corporate spending in ballot issue campaigns, commented in part that "everyone should know who is giving how much" and statements of contributions would facilitate that knowledge. Mont. H. Jud. Comm., *Hearing on SB 97*, at 5 (Mar. 7, 1975). Through its various iterations, inducement for the legislation has been the legislature's desire to prevent corruption in elections. Absent constitutional authority for an outright ban on corporate spending, prohibiting application of the "voluntary contributions" clause to expenditures made under subsection (1) will further, not frustrate, the accountability that fosters prevention of corruption.

¶57 Construing the statute to preserve its requirement for a separate segregated fund from which corporate expenditures are made will facilitate disclo-

asure under requirements promulgated by the Montana Commissioner of Political Practices. The Affidavit of Dennis Unsworth, submitted by the State before the District Court, described the disclosure process in place at the present time for corporate spending on ballot issue measures. Unsworth stated that independent expenditures from a corporate treasury to support or oppose a ballot measure must be reported on the Commissioner of Political Practices' Form C-4. The C-4 form is for "incidental political committees," which are defined in the Commissioner's rules as "a political committee that is not specifically organized or maintained for the primary purpose of influencing elections but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue." Admin. R. M. 4.10.327(2)(c). The only other types of political committees are "principal campaign committees" and "independent committees," both of which are committees specifically organized to support or oppose various candidates or issues. An independent committee includes a Political Action Committee. Admin. R. M. 4.10.327(2)(b)(i). Thus, the Commissioner's rules treat corporate treasury expenditures as expenditures by "incidental committees" because the entities do not exist for the specific purpose of supporting or opposing candidates, ballot issues, or both.

¶58 The integrity and purpose of the law can be salvaged by permitting the Commissioner to apply "incidental committee" status to a separate fund in a corporation's treasury from which election-related expenditures are made. This would ensure that

corporate contributions are on the same footing, and are given the same public daylight, as contributions from individuals, political action committees, and political parties. *See generally*, § 13-37-225, MCA; Admin. R. M. 44.10.321 – 44.10.333.

¶59 The value of disclosure in preventing corruption cannot be understated. “[B]y revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention.” *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). “[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.” *Citizens United*, 130S. Ct. at 916. The Ninth Circuit has recognized the importance of Montana’s interest in disclosure in the context of ballot issue campaigns. *Canyon Ferry Rd. Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021, 1032 (2009) (citing cases and noting disclosure requirements “may prevent ‘the wolf from masquerading in sheep’s clothing.’”). Regardless of the ultimate fate of Montana’s ban on corporate political expenditures, state disclosure requirements should be applied to all expenditures by corporate entities “in connection with a candidate or a political committee that supports or opposes a candidate or a political party.” Section 13-35-227(1), MCA.

¶60 In conclusion, I believe it is our unflagging obligation, in keeping with the courts’ duty to safeguard the rule of law, to honor the decisions of our

nation's highest Court. "Americans today accept the [United States Supreme] Court's role as guardian of the law. They understand the value to the nation of following Court decisions, . . . even when they disagree with a Court decision and even when they may be right and the decisions may be wrong." Stephen Breyer, *Making Our Democracy Work: A Judge's View* 214 (Alfred A. Knopf 2010). *Citizens United* makes clear that a state's outright ban on corporate political expenditures violates the First Amendment. Since § 13-35-227(1), MCA, imposes just such a ban, I respectfully dissent from the Court's decision to uphold the statute in its entirety. I would instead uphold only those provisions necessary to ensure independent corporate expenditures properly are reported and full disclosure is made to inform citizens and shareholders of the corporation's election-related spending.

/S/ BETH BAKER

Justice James C. Nelson, dissenting.

¶61 I respectfully dissent from the Court's decision.

### I. INTRODUCTION

¶62 The Supreme Court<sup>1</sup> could not have been more clear in *Citizens United v. Federal Election Commission*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 876 (2010): corporations have broad rights under the First Amendment to the United States Constitution to engage in political speech, and corporations cannot be prohibited from

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<sup>1</sup> I refer to the United States Supreme Court as "the Supreme Court." References to the Montana Supreme Court include "the Court," "this Court," "we," and "our."



using general treasury funds for this purpose based on antidistortion, anticorruption, or shareholder-protection interests. The language of the *Citizens United* majority opinion is remarkably sweeping and leaves virtually no conceivable basis for muzzling or otherwise restricting corporate political speech in the form of independent expenditures.<sup>2</sup>

¶63 As a result, the critical question presented in the case now before us is simply this: Has the State of Montana identified a compelling state interest, not already rejected by the Supreme Court, that would justify the outright ban on corporate expenditures for political speech effected by § 13-35-227(1), MCA? Having considered the matter, I believe the Montana Attorney General has identified some very compelling reasons for limiting corporate expenditures in Montana's political process. The problem, however, is that regardless of how persuasive I may think the Attorney General's justifications are, the Supreme Court has already rebuffed each and every one of them. Accordingly, as much as I would like to rule in favor of the State, I cannot in good faith do so.

¶64 The Court, on the other hand, views the matter differently. The Court concludes that Montana may bar corporations from using general treasury funds for political speech—*Citizens United* notwithstanding—because “Montana has unique and compelling interests to protect.” Opinion, ¶ 37. What “unique” interests render Montana exempt from *Citizens United*? One searches the Court's Opinion in vain to

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<sup>2</sup> 2 As the Court notes, direct contributions are not at issue here. Opinion, ¶ 8.

find any. The Court states that Montana has “a clear interest in preserving the integrity of its electoral process” and “an interest in encouraging the full participation of the Montana electorate.” Opinion, ¶ 38. Yet, Montana is hardly unique in this regard. Every state in the Union is interested in preserving the integrity of its electoral process and in encouraging the full participation of its electorate. The Court asserts that Montana has interests in “protecting and preserving its system of elected judges,” “preserving the appearance of judicial propriety and independence so as to maintain the public’s trust and confidence,” and “protecting the due process rights of litigants.” Opinion, ¶¶ 39, 40, 45. But surely every state with an elected judiciary has these same interests. The Court also cites “the compelling interest of the people of Montana in strong voter participation in the process.” Opinion, ¶ 41. Again, however, the people of Montana are certainly not the only people in the United States with a compelling interest in strong voter participation.

¶65 The fact is that none of the interests identified by the Court are unique to Montana. What the Court is really saying is that Montana has a unique history and unique qualities which make Montana uniquely susceptible to the corrupting influence of unlimited corporate expenditures. Indeed, the Court points to Montana’s history involving the Copper Kings—their bribery of public officials, their manipulation of state government, and their control over local judges in the late 1800s and early 1900s. Opinion, ¶¶ 22-28. Based on this history, the Court concludes that Montana voters “had a compelling interest to enact the

challenged statute in 1912.” Opinion, ¶ 36. Furthermore, the Court concludes that the dangers of corporate influence and domination still exist in Montana. Opinion, ¶¶ 29-31. In fact, the Court asserts that Montana is “especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government.” Opinion, ¶ 37. According to the Court, this is owing to Montana’s sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs. Opinion, ¶ 37. Given these characteristics, the Court opines that unlimited corporate money would “irrevocably change the dynamic of local Montana political office races, which have historically been characterized by the low-dollar, broad-based campaigns run by Montana candidates.” Opinion, ¶ 38. Moreover, the infusion of unlimited corporate money in support of or opposition to a targeted candidate would “minimize[ ] the impact of individual citizens” in the political process and leave the average citizen “effectively shut out of the process.” Opinion, ¶¶ 38, 41. Accordingly, the Court holds that Montana may flat-out prohibit direct political spending by corporations.

¶66 Respectfully, I cannot agree that this “Montana is unique” rationale is consistent with *Citizens United*. And I seriously doubt this rationale is going to prevail in the Supreme Court when this case is appealed, as it almost certainly will be. For one thing, a fair reading of the *Citizens United* majority opinion, coupled with a fair reading of the separate concurring and dissenting opinions, leads inescap-

ably to the conclusion that every one of the Attorney General's arguments—and this Court's rationales adopting those arguments—was argued, considered, and then flatly rejected by the Supreme Court. Moreover, even accepting the propositions that Montana experienced an egregious period of corporate domination and political corruption at the turn of the 20th century, that Montana citizens understandably became fed up with the heavy-handed influence and corrupt practices of special interests at the time, and that Montana to this day remains especially vulnerable to continued efforts of corporate control, what the Court and the Attorney General have failed to recognize is this fundamental point: a ban on corporate speech is not a constitutionally permissible remedy for these problems. This should be abundantly clear from the following passage in *Citizens United*:

If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by [the legislative branch] to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that *more speech, not less*, is the governing rule. *An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.*

130 S. Ct. at 911 (emphases added).

¶67 The federal law struck down in *Citizens United* (2 U.S.C. § 441b, as amended by § 203 of the Bipartisan Campaign Reform Act of 2002) prohibited corporations from expressly advocating the election or defeat of candidates and from broadcasting electioneering communications within 30 days of a primary election and 60 days of a general election. *Citizens United*, 130 S. Ct. at 887, 897. The Montana law at issue here is even more categorical, prohibiting corporations from ever using general treasury funds for political advocacy. Section 13-35-227(1), MCA ("A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."). If the federal law is facially unconstitutional, as the Supreme Court held, then I cannot envision any possibility that the Montana law will survive the predictable appeal of this Court's decision.

¶68 Unquestionably, Montana has its own unique history. No doubt Montana also has compelling interests in preserving the integrity of its electoral process and in encouraging the full participation of its electorate. And Montana may indeed be more vulnerable than other states to corporate domination of the political process. But the notion argued by the Attorney General and adopted by the Court—that these characteristics entitle Montana to a special "no peeing" zone in the First Amendment swimming pool—is simply untenable under *Citizens United*.

¶69 Admittedly, I have never had to write a more frustrating dissent. I agree, at least in principle, with much of the Court's discussion and with the



arguments of the Attorney General. More to the point, I thoroughly disagree with the Supreme Court's decision in *Citizens United*. I agree, rather, with the eloquent and, in my view, better-reasoned dissent of Justice Stevens. As a result, I find myself in the distasteful position of having to defend the applicability of a controlling precedent with which I profoundly disagree.<sup>3</sup>

¶70 That said, this case is ultimately not about my agreement or disagreement with the Attorney General or our satisfaction or dissatisfaction with the *Citizens United* decision. Whether we agree with the Supreme Court's interpretation of the First Amendment is irrelevant. In accordance with our federal system of government, our obligations here are to acknowledge that the Supreme Court's interpretation of the United States Constitution is, for better or for worse, binding on this Court and on the officers of this state, and to apply the law faithful to the Supreme Court's ruling.

¶71 Granted, there are some in the legislative and executive branches of government who would call—and, in fact, have called—for Montana to thumb its nose at the federal government, to disregard federal law, and to boldly ignore the Supremacy Clause (U.S. Const., art. VI, cl. 2). See e.g. Mike Dennison, *Bills Test State's Power to Nullify Fed Laws*, Helena Independent Record (Feb. 13, 2011). Regardless of those views, however, all elected officials in

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<sup>3</sup> The task is all the more distasteful in light of Western Tradition Partnership's questionable tactics and blatant hypocrisy. See Opinion, ¶¶ 7, 9, 19; Br. of Appellants 10-11, 22-23 (Apr. 15, 2011).

Montana—legislative, executive, and judicial—are sworn to “support, protect and defend the constitution of the United States.” Mont. Const. art. III, § 3. Obviously, this means in accordance with the Supreme Court’s interpretations of the United States Constitution. Thus, when the highest court in the country has spoken clearly on a matter of federal constitutional law, as it did in *Citizens United*, the highest court in Montana—this Court—is not at liberty to disregard or parse that decision in order to uphold a state law that, while politically popular, is clearly at odds with the Supreme Court’s decision. This is the rule of law and is part and parcel of every judge’s and justice’s oath of office to “support, protect and defend the constitution of the United States.” In my view, this Court’s decision today fails to do so.

¶72 The Supreme Court has emphatically rejected the notion that corporate political speech may be restricted based on interests in protecting against political and campaign corruption, safeguarding the ability of individual citizens to compete and participate in the political process, and preserving judicial integrity and impartiality. It makes no sense whatsoever that a state may rely on these very same interests—despite their rejection by the Supreme Court—as grounds for muzzling corporate speech simply because the state’s history, demographics, economics, and elections are in some way “unique.” It also makes no sense that, on one hand, the First Amendment protects corporate expenditures for political speech at the federal level and, apparently, through-

out the rest of the country<sup>4</sup> but that, on the other hand, this First Amendment protection magically evaporates at Montana's borders because of a law adopted 100 years ago to address a very fact-specific situation. See Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, at 6-16 (under the heading "The Montana Situation") (available at <http://mtlr.org>). Indeed, if the Supreme Court countenances this Court's approach of restricting corporate political speech rights based on population density, the existence of "mineral wealth," a history of "low-dollar, broad-based campaigns," and past experience with "heavy-handed influence" asserted by corporations, then there shortly will be nothing left of *Citizens United* at the state level. Due to its unpopularity, the Supreme Court's decision will be "state-lawed" into oblivion. While this would be a good thing in the view of many, my point here is that the Supreme Court clearly did not intend, with the broad, sweeping, and unqualified language it used, to allow the holding of *Citizens United* to be circumvented

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<sup>4</sup> See Robert Barnes, *Citizens United Decision Reverberates in Courts across Country*, Washington Post (May 22, 2011) ("The [Supreme Court's] January 2010 decision freeing corporations and unions to spend whatever they like for and against candidates wiped out laws in 24 states banning such spending. Only Montana still wages a lonely court battle to maintain the ban."); Natl. Conf. of State Legislatures, *Citizens United and the States*, <http://www.ncsl.org/default.aspx?tabid=19607> (updated Jan. 4, 2011) (noting that "[i]n 17 of the 24 states with laws affected by the *Citizens United* decision, legislation has been introduced to amend the law," and listing the bills).

through “uniqueness” stratagems.

¶73 Therefore, and with all due respect to my colleagues, I believe this Court is simply wrong in its refusal to affirm the District Court. Like it or not, *Citizens United* is the law of the land as regards corporate political speech. There is no “Montana exception.” The proof of the Court’s error is found in a comparison of the rationales provided in the Court’s Opinion with the statements by the Supreme Court rejecting those rationales. I begin with an analysis of the *Citizens United* decision.

## II. CITIZENS UNITED

¶74 A significant portion of the *Citizens United* decision is devoted to the threshold question whether the Supreme Court should even be deciding the constitutional matters that it ultimately does decide. Indeed, the five Justices in the majority—Justice Kennedy joined by Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito—consumed numerous pages attempting to explain why they were (1) addressing a claim that *Citizens United* had expressly dismissed in the district court (its facial challenge to the law’s constitutionality), (2) deciding the case on grounds that arguably were broader than necessary to resolve *Citizens United*’s claim, and (3) overruling prior precedents notwithstanding the doctrine of *stare decisis*. See *Citizens United*, 130 S. Ct. at 888-96, 911-13 (majority opinion); 130 S. Ct. at 917-25 (Roberts, C.J., & Alito, J., concurring). With regard to these issues, the dissent—Justice Stevens joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor—accused the majority of simply being “unhappy with the limited nature of the case

before us," of having "disdain" for the prior precedents, and thus of "chang[ing] the case to give themselves an opportunity to change the law."<sup>5</sup> *Citizens United*, 130 S. Ct. at 932, 938. The dissent also criticized the majority's determination to invalidate the statute on facial grounds, not only because this approach is "contrary to the fundamental principle of judicial restraint" and has the secondary effect of "implicitly striking down a great many state laws as well," but also because the record before the Supreme Court was "nonexistent." *Citizens United*, 130 S. Ct. at 932-33. Whereas Congress had crafted the Bipartisan Campaign Reform Act of 2002 (BCRA) "in response to a virtual mountain of research on the corruption that previous legislation had failed to avert," the majority "now negates Congress' efforts without a shred of evidence on how § 203 or its state-law counterparts have been affecting any entity other than *Citizens United*." *Citizens United*, 130 S. Ct. at 933. The dissent argued that "it is the height of recklessness to dismiss Congress' years of bipartisan deliberation and its reasoned judgment on this basis, without first confirming that the statute in question was intended to be, or will function as, a restraint on electoral competition." *Citizens United*, 130 S. Ct. at 969. Finally, the dissent argued that

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<sup>5</sup> Unfortunately, remaking cases is not a phenomenon exclusive to the Supreme Court. See e.g. *Western Sec. Bank and Glacier Bancorp, Inc. v. Eide Bailly LLP*, 2010 MT 291, ¶¶ 71-82, 359 Mont. 34, 249 P.3d 35 (Nelson, J., concurring in part and dissenting in part); *PacifiCorp v. State*, 2011 MT 93, ¶¶ 65-67, 360 Mont. 259, 253 P.3d 847 (Rice & Nelson, JJ., concurring).



the case could have been decided on various narrower grounds, *Citizens United*, 130 S. Ct. at 936-38, and that the majority had failed to give proper deference to the doctrine of stare decisis, 130 S. Ct. at 938-42. On this latter point, the dissent observed that

[s]tare decisis protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion. Today's decision takes away a power that we have long permitted these branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering, confirmed in [*Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391 (1990)], for more than a century. The Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and debating BCRA. The total record it compiled was 100,000 pages long. Pulling out the rug beneath Congress after affirming the constitutionality of § 203 six years ago shows great disrespect for a coequal branch.

*Citizens United*, 130 S. Ct. at 940 (emphasis in original, footnotes omitted).<sup>6</sup>

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<sup>6</sup> In addition to the foregoing criticisms by the dissent, I note that the *Citizens United* majority's approach has also been criticized for flouting the very rhetoric that conservatives have espoused for decades against so-called "judicial activism." See e.g. Erwin Chemerinsky, Op., *Conservatives*

¶75 While I believe the *Citizens United* dissent makes a persuasive argument that the majority need not and should not have rendered such a broad constitutional holding, the fact remains that the majority did so, striking down the federal law as facially invalid. Thus, my focus hereafter is on what the majority specifically held regarding corporate independent expenditures on political speech. I approach this in step-by-step fashion.

### A. The First Amendment Applies to Political Speech by Corporations

¶76 The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” This protection extends to corporations and to the context of political speech. *Citizens United*, 130 S. Ct. at 899, 900. Political speech does not lose First Amendment protection simply because its source is a corporation. *Citizens United*, 130 S. Ct. at 900. The identity of the speaker is not decisive in determining whether speech is protected; corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amend-

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*Embrace Judicial Activism in Campaign Finance Ruling*, L.A. Times (Jan. 22, 2010); see also Reza Dibadj, *Citizens United as Corporate Law Narrative*, 16 Nexus 39, 40-48 (2010-2011) (noting “technical concerns” and “constitutional problems” with the majority’s approach); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253 (2009) (criticizing the same five-Justice majority for not adhering to a conservative judicial methodology in *Dist. of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008)).

ment seeks to foster. *Citizens United*, 130 S. Ct. at 900. The Supreme Court “has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” *Citizens United*, 130 S. Ct. at 900.

### **B. Section 441b Burdens Corporate Political Speech**

¶77 The law at issue (2 U.S.C. § 441b, *as amended* by § 203 of the BCRA) prohibits corporations and unions from using general treasury funds to make independent expenditures that expressly advocate the election or defeat of candidates. It also prohibits the broadcast of electioneering communications within 30 days of a primary election and 60 days of a general election. *Citizens United*, 130 S. Ct. at 887, 897. This prohibition on corporate independent expenditures is a ban on speech. *Citizens United*, 130 S. Ct. at 898. It is true that corporations and unions may establish a “separate segregated fund” (known as a political action committee or PAC) for purposes of express advocacy or electioneering communications. The moneys received by the PAC are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Citizens United*, 130 S. Ct. at 887-88. Nevertheless, § 441b “is a ban on corporate speech not withstanding the fact that a PAC created by a corporation can still speak.” *Citizens United*, 130 S. Ct. at 897. This is because “[a] PAC is a separate association from the corporation. So the PAC exemption from § 441b’s expenditure ban does not allow corpo-

rations to speak.” *Citizens United*, 130 S. Ct. at 897 (citation omitted). Furthermore, “[e]ven if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.” *Citizens United*, 130 S. Ct. at 897.

### **C. Standard of Review: Strict Scrutiny**

¶78 “While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter,” the following standard “provides a sufficient framework for protecting the relevant First Amendment interests in this case.” *Citizens United*, 130 S. Ct. at 898. Laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. *Citizens United*, 130 S. Ct. at 898.

### **D. The Governmental-Function Interest**

¶79 The First Amendment prohibits restrictions that distinguish among different speakers, allowing speech by some but not others. *Citizens United*, 130 S. Ct. at 898. Hence, the government “may commit a constitutional wrong when by law it identifies certain preferred speakers.” *Citizens United*, 130 S. Ct. at 899. The Supreme Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on “the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech”—

e.g., the function of public school education, the penological objectives of the corrections system, and the capacity of the government to discharge its military responsibilities. *Citizens United*, 130 S. Ct. at 899. This interest is not applicable here because the corporate independent expenditures at issue would not interfere with governmental functions. Quite the contrary, “it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.” *Citizens United*, 130 S. Ct. at 899.

### E. The Antidistortion Interest

¶80 The Supreme Court in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391 (1990), found a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” *Citizens United*, 130 S. Ct. at 903 (quoting *Austin*, 494 U.S. at 660, 110 S. Ct. at 1397). The concerns in this regard are that corporations can “use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace,” and that corporate wealth can “dominat[e] . . . the political process” and “unfairly influence elections” when it is deployed in the form of independent expenditures. *Austin*, 494 U.S. at 659, 660, 110 S. Ct. at 1397, 1398 (internal quotation marks omitted).

¶81 The problem with this “antidistortion rationale,” however, is that it is inconsistent with the



First Amendment. *Citizens United*, 130 S. Ct. at 904-08. For one thing, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” *Citizens United*, 130 S. Ct. at 904 (alteration omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S. Ct. 612, 649 (1976) (per curiam)). *Buckley* rejected the premise that the Government has an interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Buckley* was specific in stating that “the skyrocketing cost of political campaigns” could not sustain the governmental prohibition. The First Amendment’s protections do not depend on the speaker’s “financial ability to engage in public discussion.” *Citizens United*, 130 S. Ct. at 904 (citations omitted).

¶82 Additionally, the antidistortion rationale interferes with the “open marketplace” of ideas protected by the First Amendment by permitting the government to ban the political speech of millions of associations of citizens. *Citizens United*, 130 S. Ct. at 906-07. Most of these are small corporations without large amounts of wealth—a fact which belies the argument that the statute at issue is justified on the ground that it prevents the “distorting effects of immense aggregations of wealth.” *Citizens United*, 130 S. Ct. at 907. In any event, political speech is indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. *Citizens United*, 130 S. Ct. at 904. “Corporations, like individuals, do not have monolithic views. On certain topics corpora-

tions may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.” *Citizens United*, 130 S. Ct. at 912. By suppressing the speech of manifold corporations, both for-profit and nonprofit, the government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. *Citizens United*, 130 S. Ct. at 907. In so doing, the government muffles the voices that best represent the most significant segments of the economy and deprives the electorate of information, knowledge, and opinion vital to its function. *Citizens United*, 130 S. Ct. at 907. When the government seeks to use its power “to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.” *Citizens United*, 130 S. Ct. at 908.

#### F. The Anticorruption Interest

¶83 The Government argues that corporate political speech may be banned in order to prevent corruption or its appearance. The *Buckley* Court found this interest sufficiently important to allow limits on contributions. *Citizens United*, 130 S. Ct. at 908 (citing *Buckley*, 424 U.S. at 25, 96 S. Ct. at 638). But when the *Buckley* Court examined a ban on independent expenditures, it found “that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the ban].” *Buckley*, 424 U.S. at 45, 96 S. Ct. at 647. For the

reasons which follow, that holding is reaffirmed here. *Citizens United*, 130 S. Ct. at 908-11.

¶84 “The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.” *Citizens United*, 130 S. Ct. at 910 (quoting *Fed. Election Commn. v. Natl. Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S. Ct. 1459, 1468 (1985)). “[C]ontribution limits, . . . unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.” *Citizens United*, 130 S. Ct. at 909. Not only can large direct contributions be given to secure a political *quid pro quo*, the scope of such pernicious practices can never be reliably ascertained. *Citizens United*, 130 S. Ct. at 908 (citing *Buckley*, 424 U.S. at 26-27, 96 S. Ct. at 638). Thus, limits on direct contributions are permissible to ensure against the reality or appearance of *quid pro quo* corruption. *Citizens United*, 130 S. Ct. at 908.

¶85 Independent expenditures, in contrast, have a substantially diminished potential for abuse. *Citizens United*, 130 S. Ct. at 908. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. *Citizens United*, 130 S. Ct. at 910. “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” *Citizens United*, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47, 96 S. Ct. at 648). Limits on independent expenditures,

therefore, "have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption." *Citizens United*, 130 S. Ct. at 908.

¶86 "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." *Citizens United*, 130 S. Ct. at 909. Two years later, the Supreme Court purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. See *First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n. 26, 98 S. Ct. 1407, 1422 n. 26 (1978). However, "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909.

¶87 The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. *Citizens United*, 130 S. Ct. at 910.

"Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.

Democracy is premised on responsiveness.”

*Citizens United*, 130 S. Ct. at 910 (ellipsis in original) (quoting *McConnell v. Fed. Election Commn.*, 540 U.S. 93, 297, 124 S. Ct. 619, 748 (2003) (Kennedy, J., Rehnquist, C.J., & Scalia, J., dissenting)). The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. As noted, an independent expenditure is, by definition, political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse to take part in democratic governance because of additional political speech made by a corporation or any other speaker. *Citizens United*, 130 S. Ct. at 910.

¶88 In sum, the hallmark of corruption is the financial *quid pro quo*: dollars for political favors. *Citizens United*, 130 S. Ct. at 910. The government has a sufficiently important interest in preventing *quid pro quo* corruption or the appearance of it. *Citizens United*, 130 S. Ct. at 909. Indeed, a *quid pro quo* arrangement would be covered by bribery laws. *Citizens United*, 130 S. Ct. at 908. Independent expenditures, however, “do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption.” *Citizens United*, 130 S. Ct. at 910 (citation omitted). Therefore, “independent expenditures, including those made by corporations,



do not give rise to corruption or the appearance of corruption.” *Citizens United*, 130 S. Ct. at 909. Of course, if elected officials succumb to improper influences from independent expenditures, surrender their best judgment, and put expediency before principle, then surely there is cause for concern; but in attempting to dispel either the appearance or the reality of these influences, “[a]n outright ban on corporate political speech . . . is not a permissible remedy.” *Citizens United*, 130 S. Ct. at 911.

### **G. The Shareholder-Protection Interest**

¶89 The Government argues that corporate independent expenditures can be limited in the interest of protecting dissenting shareholders from being compelled to fund corporate political speech with which they do not agree. The First Amendment, however, does not allow the government to restrict corporate speech based on a shareholder’s disagreement with the political views of the corporation. *Citizens United*, 130 S. Ct. at 911. There is, furthermore, little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy. *Citizens United*, 130 S. Ct. at 911.

### **H. Foreign Influence**

¶90 “We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.” *Citizens United*, 130 S. Ct. at 911.

### **I. Conclusion**

¶91 Based on the foregoing, the Supreme Court overruled its decision in *Austin*. “We return to the

principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. *No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.*" *Citizens United*, 130 S. Ct. at 913 (emphasis added). Accordingly, the Supreme Court held that BCRA § 203's restriction on electioneering communications and 2 U.S.C. § 441b's prohibition on the use of corporate treasury funds for express advocacy were both invalid. *Citizens United*, 130 S. Ct. at 913. The Supreme Court (with only Justice Thomas dissenting) then went on to uphold BCRA's disclaimer and disclosure provisions against an as-applied constitutional challenge. *Citizens United*, 130 S. Ct. at 913-16.

### III. THE PLAINTIFFS' CLAIMS

¶92 Before examining this Court's rationales upholding § 13-35-227(1), MCA,<sup>7</sup> it is necessary to dispel some misconceptions regarding the plaintiffs' claims. ¶93 First, the Court asserts that neither Gary Marbut, the founder of Montana Shooting Sports Association (MSSA), nor Kenneth Champion, the sole shareholder of Champion Painting, Inc., has demonstrated "any material way" in which Montana law has hindered or censored their political activity or speech. Opinion, ¶ 17. Of course, Marbut and Champion are not parties to this lawsuit, and their speech rights are not at issue here. Hence, whether Marbut and Champion, *as individuals*, have been

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<sup>7</sup> I occasionally refer to § 13-35-227, MCA, hereafter as "Section 227" or "§ 227."

hindered or censored in their political activity or speech is totally irrelevant. The question is whether the speech rights of MSSA and Champion Painting, *as incorporated entities*, have been infringed.

¶94 Second, the Court asserts that MSSA has failed to demonstrate that its speech has been impaired by § 227 because Montana law places no restriction on MSSA to spend its members' dues on political advocacy. Opinion, ¶ 17. As support for this, the Court cites the affidavit of former Commissioner of Political Practices Dennis Unsworth. What Unsworth specifically says, however, is this: "[MSSA] has been and continues to be free to spend its member dues and donations from its treasury regardless of its corporate status, as long as it complies with the filing requirements described above *and meets the criteria for a voluntary association.*" (Emphasis added.) The affidavit of Mary Baker, program supervisor in the Office of the Commissioner of Political Practices, likewise states that "there is nothing in Montana's campaign finance laws that would prohibit [MSSA] from registering itself as a committee and making independent expenditures from its corporate treasury, *if it meets our office's criteria for a voluntary association.*"<sup>8</sup> (Emphasis added.) According to Unsworth's

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<sup>8</sup> An exemption for "voluntary associations" is not codified in the statute. Rather, it is the Commissioner's "policy" to except such associations from § 227(1). Prior to 2003, a narrow category of nonprofit corporations was statutorily permitted to make contributions to or expenditures in connection with ballot issues, notwithstanding the general prohibition on corporate contributions and expenditures. See § 13-35-227(1), (4), MCA (2001). But in light of *Mont.*

affidavit, those criteria are as follows:

A voluntary association that incorporates can spend its members' dues and donations on campaign contributions and independent expenditures from its treasury, if it: (1) is formed for the express purpose of promoting political ideas, and could not engage in business activities; (2) has no shareholders or other persons affiliated so as to have a claim on its assets or earnings; (3) is not established by a business corporation, and does not accept contributions from business corporations.

¶95 Contrary to the Court's implication, there has been no determination in this case that MSSA in fact meets the criteria of a "voluntary association." And one of the exhibits attached to Unsworth's affidavit indicates that MSSA does *not* satisfy the criteria. The exhibit is an "advisory opinion" issued by former Commissioner Linda Vaughey on September 25, 2003, in which she addresses whether the nonprofit corporation People for Responsible Government (PRG) may engage in political activities in connection with candidates for public office. Vaughey starts with the premise that § 227 "appears on its face to prohibit all corporations, including nonprofit corporations, from making contributions or expenditures in connection with candidates, other than through separate, segregated funds." Vaughey then observes

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*Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), which held that corporations cannot be prohibited from making direct corporate expenditures in ballot initiative campaigns, the 2003 Legislature amended the statute accordingly. See Laws of Montana, 2003, ch. 59.

that, based on *Fed. Election Commn. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263-64, 107 S. Ct. 616, 631 (1986), there is an exception for nonprofit corporations which meet the three criteria listed above. Vaughey finally determines that PRG does *not* meet the third criterion because

[n]othing in the Articles of Incorporation, the Bylaws, or the other information you have provided confirms that PRG was not established by a business corporation or a labor organization. Moreover, *you have not provided any information establishing that PRG does not directly or indirectly accept donations or contributions of anything of value from business corporations or labor organizations.* [Emphasis added.]

Likewise here, there is no evidence in the record—not in Marbut's affidavit, in MSSA's Articles of Incorporation (attached to Marbut's affidavit), in Unsworth's affidavit, in Baker's affidavit, or in any other document—establishing that MSSA “does not directly or indirectly accept donations or contributions of anything of value from business corporations or labor organizations.” Hence, MSSA does *not* qualify as a “voluntary association” under the Commissioner's definition, and MSSA is *not* allowed to use its general treasury funds to make independent expenditures in connection with candidate elections. MSSA states in the First Amended Complaint that it wishes to “use its corporate funds to directly support or oppose candidates.” In light of the foregoing discussion, § 227(1) bars MSSA from doing so. The Court is flat wrong, therefore, in stating that “the



statute has no or minimal impact" on MSSA. Opinion, ¶ 46.

¶96 Third, the Court likewise misstates the impact on Champion Painting. For one thing, the Court again seems to be improperly focused on *Champion's* speech rights, which are not at issue, rather than *Champion Painting's* speech rights, which are at issue. Opinion, ¶ 18. The Court also suggests that the only reason Champion Painting is participating in this lawsuit is so that its shareholder (Champion) can be allowed to make "candidate endorsement[s]" using the company name. Opinion, ¶ 18. Finally, the Court asserts that because Champion, as sole shareholder, can simply establish a PAC to advocate for Champion Painting's interests and expend funds that he will decide to contribute, Opinion, ¶ 18, "the statute has no or minimal impact on . . . Champion," Opinion, ¶ 46. The Court is wrong on all counts.

¶97 According to the First Amended Complaint, Champion Painting intends to spend corporate funds to educate the citizens of Montana and Bozeman about political candidates and ballot issues that will either positively or negatively impact Montana's small businesses, and Champion Painting intends to publicly support or oppose candidates and issues relating to Montana's small businesses. The corporate funds will be spent to purchase TV spots and radio advertisements, and to create and distribute brochures and fliers . . . .

Champion's affidavit is to the same effect: "In addition to being politically active as an individual, I would like for Champion Painting to be politically

active. . . . Since Champion Painting is a small business, its voice will be more effective than my voice when supporting or opposing candidates who may have an impact on small businesses." It is apparent, then, that Champion Painting's claim is about the corporation's ability to speak, not its shareholder's ability to speak. And as the Court concedes, § 227(1) forbids the expenditure of Champion Painting's corporate funds to support or oppose candidates. Opinion, ¶ 18. Nothing in § 227 exempts corporations held by a sole shareholder. As for the Court's theory that Champion Painting could speak through a PAC, Opinion, ¶ 18, the Supreme Court rejected this approach as discussed above and noted again below.

#### IV. COMPARISON

¶98 I now turn to a comparison of the rationales provided in the Court's Opinion with the statements by the Supreme Court rejecting those rationales. Again, the specific issue is the constitutionality of § 227(1)'s prohibition on corporate *expenditures* in connection with a candidate or a political committee that supports or opposes a candidate or a political party. The disclosure laws, the prohibition on direct corporate contributions, and the Corrupt Practices Act as a whole have not been challenged. Opinion, ¶¶ 2, 8.

##### A. The Political Committee Alternative

¶99 Section 227(1) states that "[a] corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." Section 227(3), however, provides that "[t]his section

does not prohibit the establishment or administration of a separate, segregated fund [known as a political committee or PAC] to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation." See Opinion, ¶ 4.

¶100 The Court asserts that, in Montana, political committees are "easy to establish," "easy to use," and an "effective alternative to direct corporate spending for engaging in political speech." Opinion, ¶¶ 21, 47. The Supreme Court, however, stated: "A PAC is a separate association from the corporation. So the PAC exemption from [the law's] expenditure ban does not allow corporations to speak." *Citizens United*, 130 S. Ct. at 897 (citation omitted). Moreover, "[e]ven if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems." *Citizens United*, 130 S. Ct. at 897 (emphasis added).

¶101 The Court ignores the Supreme Court's holding that a PAC is "separate" from the corporation and, thus, is not a valid alternative to direct corporate expenditures. Indeed, the Court asserts that the Supreme Court rejected PACs "because of the burdensome, extensive, and expensive Federal regulations that applied." Opinion, ¶ 12. This is false. Granted, the Supreme Court briefly noted that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Citizens United*, 130 S. Ct. at 897. Yet, even if federal PACs were as "easily implemented" as the Court says Montana's PACs are, Opinion, ¶ 21, the

fundamental problem with PACs still remains: "A PAC is a separate association from the corporation. So the PAC exemption from [the law's] expenditure ban does not allow corporations to speak." *Citizens United*, 130 S. Ct. at 897 (citation omitted). Bottom line: "[Section 227(1)] is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation [as permitted under § 227(3)] can still speak." *Citizens United*, 130 S. Ct. at 897. The Court's contrary holding is plainly wrong.

### **B. Anticorruption and Restraining Corporate Influence**

¶102 The Court cites various examples of "well-financed corruption" perpetrated by F. Augustus Heinze, the Anaconda Company, and W.A. Clark. Opinion, ¶¶ 23-28. Notably, some of these examples involved blatant bribery and *quid pro quo* corruption (i.e., dollars for political favors), but it is not clear that any of them involved independent expenditures (i.e., political speech presented to the electorate that is not coordinated with a candidate) in exchange for political favors. In any event, the Court then proceeds to paint a dismal picture of the corporate "domination" and "influence" that has persisted in Montana. Opinion, ¶ 29. From this discussion, the Court concludes as follows. First, voters had a "compelling interest" to enact the challenged statute in 1912 because "the real social and political power [in Montana] was wielded by powerful corporate managers to further their own business interests," and the voters were fed up with the "corrupt practices" and "heavy-handed influence" asserted by the special interests controlling Montana's political institutions.



Opinion, ¶ 36. Second, the statute “has worked to preserve a degree of political and social autonomy” from “shadowy” corporate figures who seek to promote their own interests. Opinion, ¶ 37. And finally, there is still a sufficient interest to support the statute because “[i]ssues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control.” Opinion, ¶ 37.

¶103 It is patently unconstitutional, however, for the government to silence a speaker on the ground that the speaker might otherwise exert an undesired amount of “influence” or “control” in government and politics. Under such a rationale, any disfavored class of speakers could be censored if thought to be too “influential.” The Supreme Court unequivocally repudiated the notion that corporate political speech can be restricted “as a means to prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace.” *Citizens United*, 130 S. Ct. at 904 (internal quotation marks omitted). *Austin*’s holding was founded on the same concern expressed by the Court here: that “[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures.” *Austin*, 494 U.S. at 660, 110 S. Ct. at 1398. The Supreme Court in *Citizens United*, however, held that “*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures.” 130 S. Ct. at 913. The Supreme Court “re-



jected the premise that the Government has an interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Citizens United*, 130 S. Ct. at 904 (internal quotation marks omitted).

¶104 “Favoritism and influence are not . . . avoidable in representative politics,” and “[r]eliance on a generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.” *Citizens United*, 130 S. Ct. at 910 (ellipses in original, internal quotation marks omitted). More to the point, the First Amendment prohibits “restrictions distinguishing among different speakers, allowing speech by some but not others.” *Citizens United*, 130 S. Ct. at 898. “In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.” *Citizens United*, 130 S. Ct. at 902 (quoting *Belloc*, 435 U.S. at 784-85, 98 S. Ct. at 1420). The government may not bar corporations from contributing to the “open marketplace” of ideas. *Citizens United*, 130 S. Ct. at 906. “When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.” *Citizens United*, 130 S. Ct. at 908.

¶105 The Court tries to distinguish *Citizens United* as “decided upon its facts” and involving only federal laws and federal elections, while this case “concerns

Montana law, Montana elections and . . . Montana history." Opinion, ¶¶ 11, 16. Yet, *Bellotti* involved a state law, and the Supreme Court in *Citizens United* expressly noted that

[*Bellotti*] rested on the principle that the Government lacks the power to ban corporations from speaking. *Bellotti* did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti*'s central principle: *that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.*

*Citizens United*, 130 S. Ct. at 903 (emphasis added, paragraph break omitted).

¶106 Like its "influence" rationale, the Court's "corruption" rationale is also untenable. Regardless of the history of "bribery," "control," and "naked corporate manipulation" recounted by the Court, Opinion, ¶¶ 23, 25, 28, plaintiffs here do not challenge the statutory prohibition on corporate *contributions*. Rather, they challenge the prohibition on corporate *expenditures*. And the Supreme Court stated very clearly "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909. "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." *Citizens United*, 130 S. Ct. at 909. "The hall-

mark of corruption is the financial *quid pro quo*: dollars for political favors.” *Citizens United*, 130 S. Ct. at 910 (internal quotation marks omitted). “[I]ndependent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption.” *Citizens United*, 130 S. Ct. at 910 (citation omitted).

¶107 As for the Court’s fear that invalidation of § 227(1)’s prohibition on independent expenditures by corporations will return Montana to its pre-1912 days of corruption and corporate domination, the Supreme Court answered this concern as follows:

If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by [the legislature] to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that *more speech, not less*, is the governing rule. *An outright ban on corporate political speech . . . is not a permissible remedy.*

*Citizens United*, 130 S. Ct. at 911 (emphases added).

### C. Citizen Protection

¶108 The Court observes that allowing unlimited independent expenditures of corporate money into the Montana political process would “drastically change campaigning by shifting the emphasis to

raising funds." Opinion, ¶ 30. Direct political spending by corporations could also "significantly affect the outcome of elections." Opinion, ¶ 32. The Court explains that Montana has a small population and enjoys political campaigns marked by person-to-person contact and a low cost of advertising compared to other states. Opinion, ¶ 30. Thus, the infusion of unlimited corporate money in support of or opposition to a targeted candidate would leave the average citizen candidate "unable to compete against the corporate-sponsored candidate." Opinion, ¶ 38.

¶109 Furthermore, Montana voters feel they do not really "count" in the political process unless they can make a material financial contribution; and they are concerned, therefore, that special interests hold sway. Opinion, ¶ 31. The percentage of campaign contributions from individual voters is much less in states that do not have restrictions on corporate spending. Opinion, ¶ 33. At present, the individual contribution limit for Montana House, Senate, and District Court races is \$160 and for Supreme Court elections is \$310. Opinion, ¶ 38. Thus, with the infusion of unlimited corporate money in support of or opposition to a targeted candidate, "Montana citizens, who for over 100 years have made their modest election contributions meaningfully count[,] would be effectively shut out of the process." Opinion, ¶ 38. "Clearly the impact of unlimited corporate donations creates a dominating impact on the political process and inevitably minimizes the impact of individual citizens." Opinion, ¶ 41. The State "has an interest in encouraging the full participation of the Montana electorate." Opinion, ¶ 38; *accord* Opinion, ¶ 41.



¶110 While I understand the Court's desire to protect the ability of citizen candidates to compete, and the ability of citizens to meaningfully participate and be heard in the political process, this rationale has been rejected. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Citizens United*, 130 S. Ct. at 904 (brackets in original) (quoting *Buckley*, 424 U.S. at 48-49, 96 S. Ct. at 649). The Court's reasoning is essentially a repackaged version of the antidistortion rationale, which the Supreme Court answered as follows:

*Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining "an unfair advantage in the political marketplace" by using "resources amassed in the economic marketplace." But *Buckley* rejected the premise that the Government has an interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." *Buckley* was specific in stating that the skyrocketing cost of political campaigns could not sustain the governmental prohibition. The First Amendment's protections do not depend on the speaker's financial ability to engage in public discussion.

*Citizens United*, 130 S. Ct. at 904 (citations and some internal quotation marks omitted). "The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the



suppression of political speech based on the speaker's identity." *Citizens United*, 130 S. Ct. at 905. The Court's citizen-protection theory is invalid under *Citizens United*.

#### D. Elected Judges

¶111 The Court next discusses Montana's interests in "protecting and preserving its system of elected judges," providing "an independent, fair and impartial judiciary," and "preserving the appearance of judicial propriety and independence." Opinion, ¶¶ 39-40. The Court fears that "Montana judicial elections would be particularly vulnerable to large levels of independent spending, both in terms of fairness and in terms of the public perception of impartiality." Opinion, ¶ 44. The Court cites Sandra Day O'Connor's recent observation that the "crisis of confidence in the impartiality of the judiciary is real and growing."<sup>9</sup> Opinion, ¶ 45. Noting that Montana is not immune from the influence of corporate-funded "super spender groups," the Court concludes that Montana "has a compelling interest in precluding corporate expenditures on judicial elections based upon its interest in insuring judicial impartiality and integrity, its interest in preserving public confidence in the judiciary and its interest in protecting the due process rights of litigants." Opinion, ¶ 45.

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<sup>9</sup> It is somewhat ironic that the Court would cite Justice O'Connor in the context of discussing Montana's "interest in protecting and preserving its system of elected judges," given that she has been openly critical of this form of selecting judges. See *Republican Party of Minn. v. White*, 536 U.S. 765, 788-92, 122 S. Ct. 2528, 2542-44 (2002) (O'Connor, J., concurring).

¶112 While I share some of the Court's concerns,<sup>10</sup> I do not believe the Supreme Court will allow a state to single out corporations as a group and prohibit them from speaking in judicial elections. First of all, as noted already, the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, 130 S. Ct. at 898. More to the point, "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." *Citizens United*, 130 S. Ct. at 903.

¶113 Secondly, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252 (2009), which the Court cites at ¶ 43, is of no assistance. *Caperton* held that a judge was required to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." 129 S. Ct. at 2263-64. As the Supreme Court later explained in *Citizens United*, "[t]he remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." 130 S. Ct. at 910 (citation omitted). In other words, recusal is the remedy for the concern with "protecting the due process rights of litigants" (Opinion, ¶ 45), not

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<sup>10</sup> See James C. Nelson, *Keeping Faith with the Vision: Interpreting a Constitution for This and Future Generations*, 71 Mont. L. Rev. 299, 311 (2010).

banning corporate speech.

¶ 114 Third, Justice Stevens raised this exact issue in his dissent, pointing out that

[t]he majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps "*Caperton* motions" will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.

*Citizens United*, 130 S. Ct. at 968 (citations omitted). In response, the majority certainly could have left open the possibility that judicial elections implicate unique interests justifying restrictions on corporate expenditures in that particular context. The majority did not do so, however.<sup>11</sup> The majority, rather, remained firm and categorical: the First Amendment does not allow political speech restrictions based on a speaker's corporate identity, and speech restrictions aimed at reducing the relative ability of corporations to influence the outcome of elections are in-

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<sup>11</sup> Notably, the Supreme Court eight years earlier rejected as "not a true picture of the American system" the notion that an elected judiciary is completely separate from the enterprise of "representative government." *White*, 536 U.S. at 784, 122 S. Ct. at 2539.

valid. *Citizens United*, 130 S. Ct. at 903, 904.

¶115 Lastly, the Supreme Court's decision in *White*, 536 U.S. 765, 122 S. Ct. 2528, strongly indicates that the interests cited by the Court here are insufficient for prohibiting corporate speech in judicial elections. The Supreme Court—Justice Scalia joined by Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Thomas—held that the Minnesota Supreme Court's canon of judicial conduct (the "announce clause") prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violated the First Amendment. *White*, 536 U.S. at 788, 122 S. Ct. at 2542. The interests asserted in support of the announce clause were the same interests asserted by the Court in the present case:

preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary. Respondents reassert these two interests before us, arguing that the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary.

*White*, 536 U.S. at 775, 122 S. Ct. at 2535 (citation omitted). In analyzing these interests, the *White* Court considered different possible meanings of the term "impartiality." One meaning is the "lack of bias for or against either party to the proceeding," which "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *White*, 536 U.S. at 775-76, 122 S. Ct. at 2535 (emphasis in original). With-

out stating expressly whether this was a compelling state interest, the Supreme Court held that the announce clause's restriction on speech for or against particular *issues* did not serve the interest in assuring equal application of the law to particular *parties*. *White*, 536 U.S. at 776, 122 S. Ct. at 2535. Another meaning of impartiality is the "lack of preconception in favor of or against a particular *legal view*." *White*, 536 U.S. at 777, 122 S. Ct. at 2536 (emphasis in original). The Supreme Court disagreed, however, with the proposition that "[a] judge's lack of predisposition regarding the relevant legal issues in a case" is a compelling state interest. *White*, 536 U.S. at 777-78, 122 S. Ct. at 2536. Likewise, the Supreme Court concluded that a third possible meaning—"open mindedness"—was an implausible basis for the announce clause. *White*, 536 U.S. at 778-81, 122 S. Ct. at 2536-38.

¶116 Of relevance to the present discussion, the Supreme Court observed in *White* that "the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." 536 U.S. at 781, 122 S. Ct. at 2538 (alteration, emphasis, and internal quotation marks omitted). Concerning the relationship between judicial elections and the First Amendment, the Supreme Court stated:

There is an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be



elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits. . . . The disparity is perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections. That opposition may be well taken (it certainly had the support of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. *The greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.*

*White*, 536 U.S. at 787-88, 122 S. Ct. at 2541 (second ellipsis in original, brackets, citations, and internal quotation marks omitted).

¶117 Justice O'Connor made a similar point in her concurrence:

Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial

impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

*White*, 536 U.S. at 792, 122 S. Ct. at 2544 (O'Connor, J., concurring).

¶118 Perhaps most telling are the remarks of Justice Kennedy—who, as noted, authored the majority opinion in *Citizens United*. Justice Kennedy agreed that “[j]udicial integrity is . . . a state interest of the highest order.” *White*, 536 U.S. at 793, 122 S. Ct. at 2544 (Kennedy, J., concurring). He also acknowledged that a state may choose to have an elected judiciary, may strive to define those characteristics that exemplify judicial excellence, may enshrine its definitions in a code of judicial conduct, may adopt recusal standards more rigorous than due process requires, and may censure judges who violate these standards. *White*, 536 U.S. at 794, 122 S. Ct. at 2545.

*What [a state] may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer.* Deciding the relevance of candidate speech is the right of the voters, not the State. The law in question here contradicts the principle that unabridged speech is the foundation of political freedom. The State of Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system. Indeed, from the beginning there have been those who believed that the rough-

and-tumble of politics would bring our governmental institutions into ill repute. And some have sought to cure this tendency with governmental restrictions on political speech. See Sedition Act of 1798, ch. 74, 1 Stat. 596. Cooler heads have always recognized, however, that these measures abridge the freedom of speech—not because the state interest is insufficiently compelling, but simply because content-based restrictions on political speech are expressly and positively forbidden by the First Amendment. *The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.*

*White*, 536 U.S. at 794-95, 122 S. Ct. at 2545 (emphases added, internal quotation marks and some citations omitted).

¶ 119 The principle espoused by Justice Kennedy in *White*—that a state may not “censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer”—is consistent with the theme of the *Citizens United* opinion: “[I]t is our law and our tradition that more speech, not less, is the governing rule,” 130 S. Ct. at 911, and “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations,” 130 S. Ct. at 913. A fair reading of the broad holding in *Citizens United*, together with a fair reading of the First Amendment principles articulated in *White*, leads inevitably to the conclusion that corporate independent expenditures can no more be prohibited in judi-

cial elections than they can be in legislative and executive elections.

### E. Summary

¶120 In sum, what has happened here is essentially this: The Supreme Court in *Citizens United* (and in *White*) rejected several asserted governmental interests; and this Court has now come along, retrieved those interests from the garbage can, dusted them off, slapped a "Made in Montana" sticker on them, and held them up as grounds for sustaining a patently unconstitutional state statute. The erroneous premise underlying the Court's entire approach here is its belief that the Supreme Court rejected the asserted governmental interests only as applied to federal elections. Opinion, ¶¶ 11, 16. Nowhere in its decision did the Supreme Court state that there was something unique about federal elections that precluded the PAC-as-an-alternative theory, the anti-distortion rationale, or the anticorruption interest as justifications for restricting independent expenditures by corporations. The Supreme Court simply rejected all of these arguments outright, in broad and unqualified language. Not only that, the Supreme Court expressly noted that "*Bellotti* did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. *In our view, however, that restriction would have been unconstitutional under Bellotti's central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.*" *Citizens United*, 130 S. Ct. at 903 (emphasis added) (citing *Bellotti*, 435 U.S. at 784-85, 98 S. Ct. at 1420). This Court is extremely misguided,



therefore, in attempting to resurrect the rejected governmental interests under a "Montana is unique" theory.

## V. CONCLUSION

¶121 As demonstrated, the Supreme Court's decision in *Citizens United* is clear with regard to the First Amendment's protection of corporate political speech. Section 13-35-227(1), MCA, impermissibly restricts such speech by prohibiting corporations from making "an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." The statute is, therefore, facially unconstitutional under *Citizens United*.

¶122 That said, and as noted above, I agree, at least in principle, with the arguments and concerns expressed by the Attorney General and the amici curiae supporting the State. I am deeply frustrated, as are many Americans, with the reach of *Citizens United*. The First Amendment has now been elevated to a vaunted and isolated position so as to endow corporations with extravagant rights of political speech and, with those rights, the exaggerated power to influence voters and elections.

¶123 Professor Howell suggests that "[t]he disconnect between [*Citizens United's* and *Caperton's*] statements about corruption" provides Montana an opportunity to preserve its Corrupt Practices Act as applied to judicial elections. See Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, at 26 (available at <http://mtlr.org>). For my own part, I doubt that approach will be successful. In its zeal to grant corpora-



tions unlimited rights of political speech, the Supreme Court summarily dismissed its decision in *Caperton* with the statement that *Caperton* “is not to the contrary” because its holding “was limited to the rule that the judge must be recused, *not that the litigant’s political speech could be banned.*” *Citizens United*, 130 S. Ct. at 910 (emphasis added). This statement, along with the observations of the dissent in *Citizens United* and the statements by the majority and concurring opinions in *White*, lead me to conclude that *Citizens United* will eventually be applied to state judicial elections,<sup>12</sup> leaving recusals as the sole remedy where corporate expenditures have corrupted or biased the judge or judges at issue.<sup>13</sup>

¶124 Once *Citizens United* is imposed on elected state judiciaries, I am concerned—as were Justices Stevens, Ginsburg, Breyer, and Sotomayor; as are my former colleagues (see Amicus Brief of Former Montana Supreme Court Justices William Hunt, William Leaphart, James Regnier, Terry Triewweiler and John Warner (Apr. 27, 2011)); and as is the Court in today’s Opinion—that judicial elections will become little better than the corporate bidding wars

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<sup>12</sup> As reflected in the discussion of *White* (¶¶ 116-118, *supra*), and as I have previously noted (Nelson, 71 Mont. L. Rev. at 310), the system of electing judges and justices presently finds little support or esteem from the appointed federal judiciary.

<sup>13</sup> Perhaps, ironically, it will come to pass that the best way to insure that a judge or justice does *not* sit on a case involving a particular corporation is for the corporation to run a vigorous and expensive campaign supporting the judge’s election.

that elections for partisan offices have already become. I have suggested, therefore, that Montana's voters may—and probably should—amend the Montana Constitution to implement a merit system for selecting judges. See James C. Nelson, *Introduction*, 72 Mont. L. Rev. 1, 5-6 (2011); cf. W. William Leaphart, *First Right of Recusal*, 72 Mont. L. Rev. 287 (2011) (suggesting that Montana adopt an enforceable mechanism for removing Montana justices when potential bias exists).

¶125 While, as a member of this Court, I am bound to follow *Citizens United*, I do not have to agree with the Supreme Court's decision.<sup>14</sup> And, to be absolutely clear, I do not agree with it. For starters, the notion that corporations are disadvantaged in the political realm is unbelievable. Indeed, it has astounded most Americans. The truth is that corporations wield inordinate power in Congress and in state legislatures. It is hard to tell where government ends and corporate America begins; the transition is seamless and overlapping. In my view, *Citizens United* has turned the First Amendment's "open marketplace" of ideas

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<sup>14</sup> Cf. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 255-56 (2009) ("It is the solemn duty of judges on the inferior federal courts to follow, both in letter and in spirit, rules and decisions with which we may not agree. Our oath demands it, and our respect for the Supreme Court as an institution and for the able and dedicated individuals who serve on it requires no less. But esteem can likewise be manifest in the respectful expression of difference—that too is the essence of the judicial craft.").

into an auction house for Friedmanian<sup>15</sup> corporatists. Freedom of speech is now synonymous with freedom to spend. Speech equals money; money equals democracy. This decidedly was not the view of the constitutional founders, who favored the preeminence of individual interests over those of big business. *Citizens United*, 130 S. Ct. at 949-50 (dissenting opinion).

¶126 Second, I disagree with the premise that unlimited corporate political speech is essential to “enlightened self-government” and aids the electorate in making “informed choices.” *Citizens United*, 130 S. Ct. at 898, 907. I agree that “[r]hetoric ought not obscure reality.” *Citizens United*, 130 S. Ct. at 907. But I cannot agree that the *Citizens United* majority’s views reflect “reality.” For one thing, voters generally do not have the desire, much less the time, sophistication, or ability, to sift through hours upon hours of attack ads, political mumbo jumbo, and sound bites in order to winnow truth (of which there often seems to be very little) from fiction and half-truths (of which there unfortunately seems to be an endless supply).<sup>16</sup> The Supreme Court believes the solution

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<sup>15</sup> Milton Friedman: the guru, popularizer, and propagandist for unrestrained free-market economics. See Naomi Klein, *Shock Doctrine: The Rise of Disaster Capitalism* (Henry Holt & Co. 2007).

<sup>16</sup> For example, the *Los Angeles Times* recently reported that Crossroads GPS, the conservative group co-founded by Karl Rove, released an ad slamming Montana Senator Jon Tester for supporting an Environmental Protection Agency regulation on farm dust. However, one Montana cable show pulled the ad “because the network determined that it was

for false or misleading speech is more speech. Yet, an endless barrage of accusations and counter accusations providing more fodder than fact only serves to overwhelm, confuse, and disenchant voters.

¶127 Furthermore, it defies reality to suggest that millions of dollars in slick television and Internet ads—put out by entities whose purpose and expertise, in the first place, is to persuade people to buy what's being sold—carry the same weight as the fliers of citizen candidates and the letters to the editor of John and Mary Public. It is utter nonsense to think that ordinary citizens or candidates can spend enough to place their experience, wisdom, and views before the voters and keep pace with the virtually unlimited spending capability of corporations to place corporate views before the electorate. In spending ability, bigger really is better; and with campaign advertising and attack ads, quantity counts. In the end, candidates and the public will become mere bystanders in elections.

¶128 Third, with respect to the interests of shareholders in not being compelled to fund corporate political speech with which they disagree, I do not believe that participation in “corporate democracy” actually accounts for anything—unless, of course, the objecting shareholder is an insider or owns a controlling percentage of the outstanding stock. I cannot agree that “corporate democracy” will cause big business and multinational corporations to exercise re-

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false; the regulation was actually never proposed, and the vote cited in the ad was a procedural measure.” Tom Hamburger & Melanie Mason, *Chamber of Commerce Getting Early Start with Attack Ads*, L.A. Times (Nov. 16, 2011).



sponsibly their new unlimited power to speak and spend. It won't, because money, influence, and access are at stake. Any notion to the contrary is simply the triumph of hope over experience.

¶129 Fourth, I absolutely do not agree that corporate money in the form of "independent expenditures" expressly advocating the election or defeat of candidates cannot give rise to corruption or the appearance of corruption. Of course it can. Even the most cursory review of decades of partisan campaigns and elections, whether state or federal, demonstrates this. *Citizens United* held that the only sufficiently important governmental interest in preventing corruption or the appearance of corruption is one that is limited to *quid pro quo* corruption. This is simply smoke and mirrors. See *Citizens United*, 130 S. Ct. at 961 (dissenting opinion). In the real world of politics, the "*quid pro quo*" of both direct contributions to candidates and independent expenditures on their behalf is *loyalty*. And, in practical effect, experience teaches that money corrupts, and enough of it corrupts absolutely. See e.g. *Caperton*, 556 U.S. 868, 129 S. Ct. 2252.

¶130 Fifth, therefore, I cannot agree with the holding that the prevention of corruption in the form of independent expenditures is not a compelling state interest. There is no plausible reason why a state would *not* want to protect the integrity of its election process against corruption and undue influence; to do otherwise would render the fundamental right to vote a meaningless exercise. To my knowledge, the First Amendment has never been interpreted to be absolute and gloriously isolated from



other fundamental rights and values protected by the Constitution. Yet, *Citizens United* distorts the right to speech beyond recognition. Indeed, I am shocked that the Supreme Court did not balance the right to speech with the government's compelling interest in preserving the fundamental right to vote in elections.

¶131 At the same time, though, I am not persuaded that Montana's experience with corruption is as "unique" as the Attorney General and this Court posit. Each state has its own corruption horror stories and has battled political and election corruption at one time or another. Even a casual examination of the daily newspaper or the evening news proves that battling political corruption is ongoing; like painting the Golden Gate Bridge, when you reach one end, you start over at the other. It should be noted that Montana's Corrupt Practices Act was adopted in 1912 at a time when the country's focus was on preventing political corruption, not on protecting corporate influence. Due to intervening changes in the composition and philosophy of the Supreme Court, that focus has now flip-flopped. See Zephyr Teachout, *The Historical Roots of Citizens United v. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights*, 5 Harv. L. & Policy Rev. 163 (2011). Montana's Corrupt Practices Act has become an historical—and unconstitutional—artifact, and it will have to be legislatively revised to accommodate a changed time and a changed Supreme Court. A number of our sister states have modified their laws in the wake of *Citizens United* (see ¶ 72 n. 4, *supra*), and I expect that Montana's 2013 Legisla-

ture will, or should, be tasked with doing the same.

¶132 Lastly, I am compelled to say something about corporate “personhood.” While I recognize that this doctrine is firmly entrenched in the law, *see Bellotti*, 435 U.S. at 780 n. 15, 98 S. Ct. at 1418 n. 15; *but see* 435 U.S. at 822, 98 S. Ct. at 1439-40 (Rehnquist, J., dissenting), I find the entire concept offensive. Corporations are artificial creatures of law. As such, they should enjoy only those powers—not constitutional rights, but legislatively-conferred powers—that are concomitant with their legitimate function, that being limited-liability investment vehicles for business. Corporations are not persons. Human beings are persons, and it is an affront to the inviolable dignity of our species that courts have created a legal fiction which forces people—human beings—to share fundamental, natural rights with soulless creations of government. Worse still, while corporations and human beings share many of the same rights under the law, they clearly are not bound equally to the same codes of good conduct, decency, and morality, and they are not held equally accountable for their sins. Indeed, it is truly ironic that the death penalty and hell are reserved only to natural persons.

¶133 Having said all this, I must return to the central point of this Dissent. Regardless of my disagreement with the views of the *Citizens United* majority, the fact remains that the Supreme Court has spoken. It has interpreted the protections of the First Amendment vis-à-vis corporate political speech. Agree with its decision or not, Montana’s judiciary and elected officers are bound to accept and enforce the Supreme Court’s ruling—in the same way that

this Court demands obedience to its rulings, like them or not.

¶134 For these reasons, I dissent from the Court's analysis in the instant case. I disagree with the Court's decision to parse *Citizens United* in a fashion so as to "send a message" to, or be the next "test case" before, the Supreme Court. In my view, this approach is disingenuous. Montana is in the same First Amendment swimming pool as every other state, and the Supreme Court has dictated that its waters are expansive and deep when it comes to corporate political speech. *Citizens United* is the law of the land, and this Court is duty-bound to follow it. When this case is appealed to the Supreme Court, as I expect it will be, a summary reversal on the merits (see U.S. Sup. Ct. R. 16) would not surprise me in the least.

¶135 In my opinion, District Court Judge Sherlock's well-reasoned and courageous—though politically unpopular—decision should be affirmed. I cannot agree with this Court's determination not to do so. Therefore, I respectfully and regretfully dissent.

/S/ JAMES C. NELSON

*(Editing Note: This Order is available at 2010 WL 4257195. Page numbers (\*1) are to the slip opinion.)*

Nancy Sweeney  
Clerk District Court  
Filed by illegible  
Deputy

[*"Received" stamp omitted.*]

2010 Oct 18 A 11:49

**MONTANA FIRST JUDICIAL DISTRICT  
COURT LEWIS AND CLARK COUNTY**

WESTERN TRADITION  
PARTNERSHIP, INC., a  
corporation registered in  
the State of Montana, and  
CHAMPION PAINTING,  
INC., a Montana corpora-  
tion; MONTANA  
SHOOTING SPORTS AS-  
SOCIATION, INC., a  
Montana corporation,  
Plaintiffs,

v.

ATTORNEY GENERAL of  
the State of Montana, and  
COMMISSIONER OF PO-  
LITICAL PRACTICES,  
Defendants.

Cause No.  
BDV-2010-238

**ORDER ON  
CROSS-MOTIONS  
FOR  
SUMMARY  
JUDGMENT**

This matter is before the Court on Plaintiff's mo-  
tion for summary judgment and Defendant's cross-  
motion for summary judgment. Plaintiff's motion

seeks a declaration that Section 13-35-227(1), MCA, as it applies to independent corporate expenditures is unconstitutional under the recent United States Supreme Court decision regarding corporate expenditures, *Citizens United v. Fed. Election \*2 Comm'n*, 130 S. Ct. 876, 175 L. Ed. 753 (2010). Plaintiffs seek an injunction permanently enjoining Defendants and all county attorneys from enforcing the statute. Plaintiffs also seek their attorney fees and costs. Defendants' cross-motion argues that the statute is constitutional and should be upheld.

### **BACKGROUND**

Plaintiff Champion Painting, Inc. (Champion Painting), is a small family-owned painting and dry-wall business incorporated in the State of Montana. Champion Painting does not have employees or members—its sole shareholder is Kenneth Champion. Champion Painting would like to spend its corporate funds to participate in public discussions, purchase TV spots and radio advertisements, and create and distribute brochures and fliers to support or oppose political candidates it believes will have a positive or negative effect on small businesses.

Montana Shooting Sports Association, Inc. (MSSA), is a not-for-profit corporation incorporated under the laws of the State of Montana. MSSA would like to use its corporate funds to support or oppose candidates depending on candidates' positions on issues dear to MSSA's purpose. MSSA would spend its general treasury funds on direct mail, newspaper, and radio advertising to its members and the general public.

Western Tradition Partnership, Inc. (WTP), is a



non-profit corporation registered with the Montana Secretary of State, but organized under the laws of the State of Colorado.

Montana law prohibits a corporation from making "an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or political party." Section 13-35-227(1), MCA (hereafter Section 227). An "expenditure" includes "a purchase, payment, distribution, loan, advance, promise, \*3 pledge, or gift of money or anything of value made for the purpose of influencing the results of an election." Section 13-1-101(11), MCA. It does not include, among other things, "the cost of any bona fide news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation." Section 13-1-101(11)(b)(iii), MCA. A corporation may establish a separate, segregated fund (also known as a "political committee" or "PAC") to make expenditures "if the fund consists of only voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation." Section 13-35-227(3), MCA. A person who violates Section 227 may be "liable in a civil action brought by the commissioner or a county attorney . . . for an amount of up to \$500 or three times the amount of the unlawful contribution or expenditure, whichever is greater." Section 13-37-128(2), MCA.

Plaintiffs do not challenge the prohibition against direct corporate contributions to candidates or Montana's disclosure or disclaimer laws. What is at issue here are independent corporate expenditures made

on behalf of a candidate. Corporations, under current Montana law, are allowed to make independent expenditures on ballot issues. *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000).

### STANDARD OF REVIEW

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), M.R.Civ.P.

The party moving for summary judgment must establish the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Tin #4 Cup County Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts that raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)). Conclusory statements and assertions will not prevent summary judgment. *Id.*

### DISCUSSION

In this case, the material facts, none of which are disputed, are as follows: 1) Section 227 expressly prohibits corporations from using their corporate funds to support or oppose political candidates or political parties; 2) Section 227 does not prohibit individuals, unincorporated associations, or the media from using their funds to support or oppose political candidates

or political parties; 3) Plaintiffs are corporations; 4) Plaintiffs would like to spend corporate funds to publicly support or oppose political candidates and/or political parties; and 5) Defendants have the statutory authority to prosecute and seek penalties against Plaintiffs if Plaintiffs violate Section 227.

The Court notes that currently 26 states allow independent expenditures by for-profit corporations. *Citizens United*, 130 S. Ct. at 908-08, 175 L. Ed. at 793.

The Court further notes that Section 227 was enacted as the Corrupt Practices Act of 1912. *Initiative Act*, Nov. 1912, Sec. 25, 1913 Mont. Laws at 604. The impetus for the passage of the Corrupt Practices Act by initiative in 1912 was the activities of Montana's "Copper Kings." In this regard, the Court has been favored \*5 with the affidavit of Dr. Harry Fritz, a former professor at the University of Montana.<sup>1</sup> Dr. Fritz notes that "[i]n 1900, a Committee of United States Senate Committee on Privileges and Elections 'expressed horror at the amount of money which had been poured into politics in Montana in elections from 1888 onward' and 'its concern with respect to the general aura of corruption in Montana.' K. Ross Toole; *Montana: An Uncommon Land*, 190 (Univ. Okla. 1959)." (State's Combined Br. Opp'n Pl.s' Mot. Summ. J. & Supporting State's Mot. Summ. J., Attach. Fritz Aff., ¶ 14.) Montana's Corrupt Practices Act grew out of and reflected Montanan's opposition

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<sup>1</sup> It should be noted that the author of this opinion was a student of Dr. Fritz in 1971 and 1972, and then, as now, the Court finds Dr. Fritz's comments to be most helpful.

and intolerance to abuses that grew out of the corporate revolution of the late 19th century, including the power wielded by the "Copper Kings" of Montana and other powerful corporate interests. (*Id.*, ¶ 5.) Dr. Fritz further noted that "[c]orporate interests controlled by the Copper Kings dominated political debate in Montana, and drowned out Montanan's own voices in the political process." (*Id.*, ¶ 18.) Dr. Fritz noted that the initiative of 1912 was prompted by the actions of the Amalgamated Copper Company in 1903 when, after an unfavorable court ruling, the company threw 80 percent of the State's wage earners on the street until a bill favorable to Amalgamated was passed. According to Fritz, this was "naked corporate blackmail of a sovereign state and Montanans never forgot it." (*Id.*, ¶ 16.)

At issue in this case is whether Section 227 violates the First Amendment to the United States Constitution and Article II, section 7, of the Montana Constitution. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the \*6 freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Similarly, Article II, section 7, of the Montana Constitution provides:

No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on



any subject, being responsible for all abuse of that liberty. In all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.

The various states are bound by the guarantees of the First Amendment through the due process clause of the Fourteenth Amendment to the United States Constitution. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630 (1925); *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 438, 704 P.2d 1021, 1024 (1985). In this case, as noted above, Plaintiffs are alleging that Section 227 violates the Montana and United States Constitutions.

"We start with the presumption that all legislative enactments comply with Montana's Constitution." *Bean v. State*, 2008 MT 67, ¶ 12, 342 Mont. 85, 179 P.3d 524 (citations omitted). The party challenging a statute bears the burden of establishing the statute's unconstitutionality beyond a reasonable doubt. *Id.* We construe statutes narrowly to avoid a finding of unconstitutionality and resolve any questions of constitutionality in favor of the statute. *Id.*; *Disability Rights Mont. v. State*, 2009 MT 100, ¶ 18, 350 Mont. 101, 207 P.3d 1092 (citing *Bean*, ¶ 12).

If it is found that Section 227 burdens speech, that statute will be subject to strict scrutiny. Strict scrutiny requires the government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S. Ct. at 898, 175 L. Ed. at 782 (quoting *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S.



449, 464, 127 S. Ct. 2652 (2007)).

\*7 The first issue the Court must address is whether Section 13-35-227(1), MCA, burdens speech that is protected by the First Amendment. In *Citizens United*, the United States Supreme Court held that federal prohibition on independent expenditures of corporations is a ban on speech. "As a restriction on the amount of money a person or group can spend on political communication during a campaign, that statute necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckly v. Valeo*, 424 U.S. 1, 19, 96 S. Ct. 612, 635 (1976). In *Citizens United*, the Supreme Court went on to note:

Speech is an essential mechanism of democracy for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "has its fullest and most urgent application to speech uttered during an campaign for political office."

*Citizens United*, 130 S. Ct. at 898, 175 L. Ed. at 781-82. (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) (other citation omitted).

By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth,

standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. *Citizens United*, 130 S. Ct. at 899, 175 L. Ed. at 782.

In *Citizens United*, the United States Supreme Court was dealing with 2 U.S.C. § 441b. That provision was part of a statutory scheme that forbid independent corporate contributions to candidates 30 days prior to a primary and 60 days prior to a general election. It is important to note here that Section 227 is even stricter in that it \*8 at no time authorizes the expenditure of independent corporate funds on behalf of a candidate.

The speech here at question emanates from a corporation. *Citizens United*, 130 S. Ct. at 900, 175 L. Ed. at 784; *Mont. Auto. Assn. v. Greely*, 193 Mont. 378, 388, 632 P.2d 300, 305 (1981). There is no question that this corporate-protected political speech is impacted by Section 227. A similar restriction before the United States Supreme Court in *Citizens United* was held to be a "ban on speech." *Citizens United*, 130 S. Ct. at 898, 175 L. Ed. at 781.

The State suggests that the burden placed on corporate speech as a result of Section 227 is minimal. First, the State suggests that corporations could create a political action committee (PAC) or a segregated account to make independent expenditures. However, the Supreme Court in *Citizens United* held that "Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate associa-

tion from the corporation. So the PAC exemption . . . does not allow corporations to speak. *Citizens United*, 130 S. Ct. at 897175 L. Ed. at 780. Also, as noted by the Ninth Circuit Court in *Argenbright*, “[t]here is no question that a law requiring corporations to make independent expenditures (even for candidates) through a segregated fund burdens corporate expression.” *Argenbright*, 266 F.3d at 1057.

The Court also has to reject the State’s suggestion that corporations can lobby elected officials after an election in order to have their voices heard. Obviously, lobbying occurs after an election and is no substitute for allowing free expression during an election.

The State also suggests that Plaintiffs in this case are not particularly burdened by this statute. The State points to MSSA as an example. According to the \*9 State, as an incorporated voluntary association, MSSA is free to spend member dues on independent expenditures from its corporate treasury. (State’s Combined Br. Opp’n Pl.s’ Mot. Summ. J. & Supporting State’s Mot. Summ. J., Attach. Unsworth Aff., ¶ 15.) Further, the State suggests that Champion Painting can speak because it is a sole proprietorship. However, there is nothing in Section 227 that specifically exempts either of these corporations from the prohibitions of the statute. The State then attempts to portray WTP as an unsavory entity up to no good. That may or may not be the case, but it is clear to this Court that Section 227 applies to WTP. Whatever one might think of WTP, this Court does not have the power to take away its First Amendment right to support or oppose political candidates of its choice.

The Court, then, concludes that the First Amendment to the United States Constitution protects the political speech of corporations, including their right to make independent expenditures to support or oppose political candidates or parties. Like Section 441b faced by the United States Supreme Court in *Citizens United*, Section 227 restricts corporate political speech and favors some speakers over corporations. Thus, Section 227 abridges Plaintiffs' right to engage in political speech.

The Court has earlier noted that upon such a showing, the burden shifts to Defendants to show that the restriction is justified by a compelling state interest and is narrowly tailored to achieve that interest. This Court concludes that there has been no compelling interest shown to justify the abridgment of Plaintiffs' First Amendment rights; further, Section 227 is not narrowly tailored to meet any interest claimed to be compelling.

First, the State claims that an anti-corruption interest is sufficient to justify the restriction on Plaintiffs' First Amendment rights. The Court has already quoted portions of the affidavit submitted by Dr. Fritz showing the pernicious \*10 influence of the Copper Kings and their various corporate alter egos. However, the Copper Kings are a long time gone to their tombs. Further, the Supreme Court in *Citizens United* addressed this very concern. In that case, the Supreme Court held that the anti-corruption interest is not sufficient to displace the speech here in question, noting that 26 states do not restrict independent expenditures by for-profit corporations. *Citizens United*, 130 S. Ct. at 908-09175 L. Ed. at 793. In so



holding, the Supreme Court drew a distinction between the appearance of corruption that could arise from unlimited money funneled directly to candidates as opposed to independent expenditures. Further, even if the corruption interest was found to be a compelling one, Section 227 is not narrowly tailored to meet that interest. The statute, for example, does not extend to media corporations, unincorporated associations, or wealthy individuals. Further, it applies to any expenditure regardless of its size.

The State's attempt to justify Section 227 as a tool to protect dissenting shareholders was rejected by the decision in *Citizens United*. *Citizens United*, 130 S. Ct. at 911, 175 L. Ed. at 796. *Citizens United* rejected this rationale due to the fact that the statute there in question, as is the case with the statute here, fails to allow independent expenditures even if the shareholders unanimously agree on an issue. Further, shareholders are capable of protecting themselves through corporate democracy. Also, Section 227 is not narrowly tailored to address the shareholder interest. It is not limited to corporations with more than one shareholder. It also applies regardless of whether the shareholders unanimously agree to support or oppose a candidate.

Next, the State suggests that an "anti-distortion interest" justifies Section 227. Of concern here is the possible distorting effect of immense aggregations of money. The anti-distortion interest was recognized by the United States Supreme \*11 Court in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391 (1990). However, *Austin* was expressly overruled by the Court in *Citizens United*. *Citizens*



*United*, 130 S. Ct. at 913, 175 L. Ed. at 798. Again, even if this anti-distortion interest were available after *Citizens United*, Section 227 does not appear to be narrowly tailored to meet that interest. For example, it applies to all corporations regardless of size or wealth, or whether the corporation is one that is non-profit.

The State also asserts an interest in preventing circumvention of its disclosure laws as justifying any speech restrictions occasioned by Section 227. However, the answer to this problem is not a ban on speech, but the enactment of more comprehensive disclosure laws.

The State suggests that if the Court finds Section 227 unconstitutional as it applies to independent expenditures, the Court should leave the predecessor to Section 13-35-227, MCA, in tact. For this proposition, the State cites *State ex rel. Woodahl v. Dist. Ct.*, 162 Mont. 283, 511 P.2d 318 (1973). The Court finds *Woodahl* to be of limited use, as it has not since been cited by the Montana Supreme Court as supporting the proposition here suggested by the State. In addition, *Woodahl* addressed a fact situation unique to that case. The issue there was whether a statute was even constitutional when it was passed. That is not the situation here. No one in this case is suggesting that Section 227 was unconstitutional when it was passed. Section 227 became unconstitutional only after the *Citizens United* case was decided. Therefore, *Woodahl* has no application to the facts presently before this Court.

Thus, this Court concludes that there is no compelling state interest to support Section 227 and,

even if there were, it appears to the Court that Section 227 is not narrowly tailored to achieve the interests asserted.

**\*12** Therefore, the Court declares that Section 13-35-227(1), MCA, as it pertains to independent corporate expenditures, is unconstitutional and unenforceable due to the operation of the First Amendment to the United States Constitution. Since Section 227 violates the First Amendment to the United States Constitution, this Court sees no need to decide whether Section 227 violates the Montana Constitution. It should here be noted that this ruling has no effect on direct corporate contributions to candidates or to any existing or future disclosure laws that might be enacted.

The Court should also note that since *Citizens United* was issued, at least two other states have considered this issue. On August 9, 2010, the Wisconsin Attorney General ruled as unconstitutional Wisconsin's Statute 11.38(1)(a)(i). See Wis. Op. Att'y Gen 05-10. Further, Minnesota statute Section 211B.15(3) was found wanting in *Minn. Chamber of Commerce v. Gaertner*, 2010 U.S. Dist. LEXIS 51334 (D.C. MN 2010).

This Court has spent some time analyzing its decision. However, the Court has to agree with United States District Court Judge Paul Magnuson in *Minn. Chamber of Commerce*. In his decision, Judge Magnuson stated "[t]he Supreme Court's decision in *Citizens United* is unequivocal: the government may not prohibit independent and indirect corporate expenditures on political speech. Subdivision 3 does just that." *Minn. Chamber of Commerce*,

2010 U.S. Dist. LEXIS at 10.

### ATTORNEY FEES AND COSTS

Plaintiffs seek their attorney fees and costs. Generally, Montana follows the American Rule which provides that a party in a civil action is generally not entitled to attorney fees absent specific contractual or statutory provision. *Montanans for Responsible Use of the Sch. Trust v. State (Montrust)*, 1999 MT 263, ¶ 62, 296 Mont. 402, 989 P.2d 800. However, the Montana Supreme Court has adopted the Common\*13 Fund Doctrine which provides that when a party, through litigation, creates, reserves, or increases a fund, others sharing in the fund must bear a portion of the litigation costs including a reasonable attorney fee. *Montrust*, ¶ 64. Also available is the private attorney general doctrine and its three-part inquiry as follows: 1) the strength or a societal importance of the public policy vindicated by the litigation; 2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and 3) the number of people standing to benefit from the decision. *Montrust*, ¶ 66.

Clearly, the issues here are very important and are grounded in the United States Constitution. Next, since the State is required to defend the statute in the present case, private enforcement of these important constitutional rights was required. The final question is whether there is a large number of people standing to benefit from the decision. On this point, the Court is not so sure. While the Plaintiff corporations will certainly benefit from this ruling there is no reasonable way of knowing "the number of people" standing to benefit from this decision.

Therefore, the Court will not award attorney fees under the private attorney general doctrine.

Further, the Court does not find that it is necessary and proper to award attorney fees under the Uniform Declaratory Judgment Act, Section 27-8-313, MCA. While the Court may have authority to award attorney fees under the Declaratory Judgment Act, it does not feel it necessary and proper to do so in this case. The State's arguments were made in good faith and were supported by briefs that were meticulously researched, well written, and well argued.

### CONCLUSION

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiffs' motion for summary judgment is GRANTED. \*14

2. Defendants' motion for summary judgment is DENIED.

3. Section 13-35-227(1), MCA, insofar as it prevents corporations from making independent expenditures to support or oppose political candidates or political parties, is declared unconstitutional.

4. Defendants are permanently enjoined from enforcing the expenditure prohibition found in Section 13-35-227(1), MCA.

5. Plaintiffs are awarded their costs, but not their attorney fees.

DATED this 18 day of October 2010.

110a

/S/ Jeffrey M. Sherlock

**JEFFREY M. SHERLOCK**

District Court Judge

pcs: Margot E. Barg

Steve Bullock/Anthony Johnstone/James P. Molloy



<p><b>WESTERN TRADITION PARTNERSHIP, INC.,</b> a corporation registered in the State of Montana, and <b>CHAMPION PAINTING, INC.,</b> a Montana corporation; <b>MONTANA SHOOTING SPORTS ASSOCIATION, INC.,</b> a Montana corporation, Plaintiffs,</p> <p>v.</p> <p><b>ATTORNEY GENERAL</b> of the State of Montana, and <b>COMMISSIONER OF POLITICAL PRACTICES,</b> Defendants.</p>	<p>Cause No. BDV-2010-238</p> <p><b>JUDGMENT</b></p>
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By Order dated October 18, 2010, hereby incorporated by reference, this Court granted Plaintiffs' Motion for Summary Judgment, and Denied Defendants' Motion for Summary Judgment. The Court further denied Plaintiffs' request for attorneys fees, but granted Plaintiffs' request for costs.

ACCORDINGLY,

**JUDGMENT** is hereby entered in favor of Plaintiffs and against Defendants. Plaintiffs are awarded

their costs in the amount of \$1,544.80.

DATED this 31 day of February, 2011.

/S/ Jeffrey M. Sherlock

**HON. JEFFREY M. SHERLOCK**

District Court Judge

c: Anthony Johnstone & James P. Molloy

Margot Barg

**IN THE SUPREME COURT OF THE STATE  
OF MONTANA**

No. DA 11-0081

**WESTERN TRADITION  
PARTNERSHIP, INC.**, a corpo-  
ration registered in the State of  
Montana, and **CHAMPION  
PAINTING, INC.**, a Montana  
corporation, **MONTANA  
SHOOTING SPORTS ASSOCI-  
ATION, INC.**, a Montana cor-  
poration,

Plaintiffs, Appellees, and  
Cross-Appellants

v.

**ATTORNEY GENERAL** of the  
State of Montana, and **COM-  
MISSIONER OF THE COM-  
MISSION FOR POLITICAL  
PRACTICES**,

Defendants, Appellants and  
Cross-Appellees.

**FILED**

Feb 07 2012

Ed Smith

Clerk of the  
Supreme Court  
State of Montana

**ORDER**

Western Tradition Partnership, Inc., et al., have moved for a stay of this Court's decision and judgment reversing the District Court and granting summary judgment to Appellants. They seek to stay this Court's decision herein pending their petition for a writ of certiorari to the Supreme Court of the United

States and resolution of all matters related to that petition. The Appellants have filed a response objecting to the motion to stay.

The Court, having reviewed the motion to stay and the response,

**IT IS ORDERED** that the motion to stay is **DENIED**.

The Clerk is directed to provide copies of this order to all counsel of record.

DATED this 7th day of February, 2012.

/S/ Mike McGrath

Chief Justice

/S/ Patricia Cotter

/S/ Michael Wheat

/S/ Brian Morris

/S/ James Rice

While maintaining our respective dissents, we have joined the order denying the motion for stay, in order that the Appellees and Cross-Appellants can proceed with their appeal to the United States Supreme Court.

/S/ James Nelson

/S/ Beth Baker

[Counsel name omitted]

[Filed April 15, 2010]

**MONTANA FIRST JUDICIAL DISTRICT,  
LEWIS AND CLARK COUNTY, STATE OF  
MONTANA**

WESTERN TRADITION ) Cause No. BDV-  
PARTNERSHIP, Inc., a cor- ) 2010-238  
poration registered in the )  
State of Montana, CHAM- )  
PION PAINTING, INC., a )  
Montana Corporation, MON- )  
TANA SHOOTING SPORTS )  
ASSOCIATION, INC., a )  
Montana Corporation, )  
Plaintiffs, )  
vs. ) **FIRST**  
ATTORNEY GENERAL of ) **AMENDED**  
the State of Montana, and ) **COMPLAINT**  
COMMISSIONER OF THE )  
COMMISSION FOR POLITI- )  
CAL PRACTICES, )  
Defendants. )

PURSUANT TO Rule 15(a) of the Montana Rules of Civil Procedure, comes now the Plaintiffs Western Tradition Partnership, Inc., Champion Painting, Inc., and Montana Shooting Sports Association, Inc., and files this First Amendment Complaint against Defendants, as follows:

## INTRODUCTION

1. This is a proceeding for declaratory relief under



the Uniform Declaratory Judgments Act, § 27-8-101, *et seq.*, MCA, for the purpose of determining the constitutionality of several statutes, or sections thereof, within the Election and Campaign Practices and Criminal Provisions, § 13-35-101, *et. seq.*, MCA. This is also a proceeding under 42 U.S.C. § 1983 to prevent the violation of civil rights under color of state law. Finally, this is a proceeding for a preliminary injunction under § 27-19-101, *et. seq.*, MCA, to immediately prevent the Defendants from restricting the Plaintiffs' constitutional right to engage in lawful political speech.

### THE PLAINTIFFS

2. The Plaintiff Western Tradition Partnership, Inc. ("Western Tradition") is a nonprofit corporation registered with the Montana Secretary of State and organized under the laws of the State of Colorado.

3. Western Tradition is a grassroots organization dedicated to "Rediscovering America's National Treasures" by promoting responsible natural resource development, private property rights, and multiple use of and access to public lands. One method employed by Western Tradition to promote its agenda is to survey federal, state, county, and local level political candidates, including candidates in Montana, to determine candidates' support or opposition to numerous issues. These issues include, but are not limited to, learning about candidates' positions on sponsoring free market solutions on energy, land, and water issues, lowering utility costs, thinning dying forests to prevent fire and provide jobs, and reforming the legal process to prevent frivolous lawsuits by certain groups. The results of the survey are then reported

to its members, including members in Montana, through polling, direct mail, and phone campaigns, in order to educate members about the candidates' positions. If it could, Western Tradition would also use corporate funds to engage in polling, direct mail, advertising and phone campaigns that publicly support or oppose candidates. Furthermore, Western Tradition would not only communicate its support or opposition of candidates to its Montana members, but also to voters in the general public. Such corporate funds would be used before the June 8, 2010 primary election and the November 2, 2010 general election.

4. The Plaintiff Champion Painting, Inc. ("Champion Painting") is a for-profit close corporation organized under the laws of the State of Montana. Its principal place of business is in Bozeman, Montana.

5. Champion Painting's activities consist of providing painting services to individuals and businesses. The business is owned and managed by Ken Champion. Mr. Champion is politically active in supporting and opposing political candidates and issues on both the local and state level. He has been and continues to be an active member of the Gallatin County Campaign for Liberty, which advocates the return of the constitutional republic. He has also been and continues to be a member of the Bozeman Tea Party, which, among other things, seeks to educate the public about the consequences of unrestrained government spending. In addition to these issues, as a small business owner Mr. Champion is also concerned with the way inflation, taxation, and spending are exploiting, impacting, and bankrupting

America and Montana's small businesses. Thus, Champion Painting intends to spend corporate funds to educate the citizens of Montana and Bozeman about political candidates and ballot issues that will either positively or negatively impact Montana's small businesses, and Champion Painting intends to publicly support or oppose candidates and issues relating to Montana's small businesses. The corporate funds will be spent to purchase TV spots and radio advertisements, and to create and distribute brochures and fliers before the June 8, 2010 primary election and the November 2, 2010 general election.

6. The Plaintiff Montana Shooting Sports Association, Inc. ("MSSA") is a non-profit corporation registered and organized under the laws of the State of Montana.

7. The purpose of MSSA is to support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms; to educate its members concerning shooting, firearms, safety, hunting, and the right to keep and bear arms; to own and/or manage one more shooting facilities for the use of its members and/or others; to research, consider, and provide comment on public policy and issues affecting the association and its members; and to conduct such other activities as serves the needs of its members. In order to achieve its purposes, MSSA often identifies issues for the Montana Legislature to consider, and its efforts have been instrumental in the passage of numerous Montana statutes. To learn more about the Montana Legislature and Legislative candidates, MSSA publishes a Legislative Candidate Questionnaire

("LCQ") on the Internet for candidates to complete and submit to MSSA. The LCQ identifies issues and potential legislation related to MSSA's purposes, and asks whether the candidate will sponsor, cosponsor, support, be neutral, or oppose those issues and/or legislation. MSSA uses the LCQ, in conjunction with voting records and other information, to evaluate candidates for the Montana Legislature. In order to support or oppose the candidates it evaluates, MSSA must currently go through an expensive and complex state political action committee. If it could, MSSA would instead use its corporate funds to directly support or oppose candidates and issues via direct mail, newspaper, and radio advertising to its members and to the general public. Such corporate funds would be used before the June 8, 2010 primary election and the November 2, 2010 general election.

### **THE UNCONSTITUTIONAL RESTRICTION ON POLITICAL SPEECH**

8. Section 13-35-227, MCA, prohibits the Plaintiffs from expending corporate funds to engage in political speech, and it subjects the Plaintiffs to civil penalties if they do. The statute reads:

- (1) A corporation may not make a contribution or an **expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.**
- (2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).
- (3) This section does not prohibit the establishment or administration of a separate,

segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

- (4) A person who violates this section is **subject to the civil penalty** provision of 13-37-128.

(Emphasis added.)

9. An "expenditure" is defined in § 13-1-101(11), MCA, as follows:

- (a) "Expenditure" means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an election.
- (b) "Expenditure" does not mean:
  - (i) services, food, or lodging provided in a manner that they are not contributions under subsection (7)
  - (ii) payments by a candidate for a filing fee or for personal travel expenses, food, clothing, lodging, or personal necessities for the candidate and the candidate's family;
  - (iii) the cost of any bona fide news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation; or



- (iv) the cost of any communication by any membership organization or corporation to its members or stockholders or employees.

10. Pursuant to Administrative Rules of Montana, Rule 44.10.323(3), "expenditure" also includes an "independent expenditure," which is defined as:

"Independent expenditure" means an expenditure for communications expressly advocating the success or defeat of a candidate or ballot issue which is not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or political committee or an agent of a candidate or political committee. An independent expenditure shall be reported as provided in ARM 44.10.531.

11. An "election" extends to "a general, regular, special, or primary election held pursuant to the requirements of state law, regardless of the time or purpose." § 13-1-101 (8), MCA.

12. "Person" means an individual, corporation, association, firm, partnership, cooperative, committee, club, union, or other organization or group of individuals or a candidate as defined in subsection (6)." § 13-1-101(20), MCA.

13. The relevant portion of the penalty provision set forth in § 13-37-128 reads:

- (2) A person who makes or receives a contribution or expenditure in violation of 13-35-227, 13-35-228, or this chapter or who violates 13-35-226 is liable in a civil action

- brought by the commissioner or a county attorney pursuant to the provisions outlined in 13-37-124 and 13-37-125 for an amount up to \$500 or three times the amount of the unlawful contribution or expenditure, whichever is greater.

14. The prohibition against corporate expenditures to support or oppose a candidate or political party as set forth § 13-35-227(1), MCA, violates Article II, § 7 of the Constitution of the State of Montana, and the First Amendment of the Constitution of the United States of America, in that it abridges the Plaintiffs' freedom to engage in political speech. Therefore, the prohibition against corporate expenditures as set forth in § 13-35-227(1), MCA, is illegal, unconstitutional, and without force of law.

### **THE DEFENDANTS**

15. Pursuant to § 13-37-125, MCA, and § 13-37-128, MCA, the Attorney General, by and through the county attorneys under his supervision, is one of the state officers charged with the enforcement and administration of § 13-35-227, MCA. Therefore, the Attorney General has an interest in this proceeding and the issues herein involved.

16. The Attorney General has expressed his intent to use his power under § 13-37-128, MCA, to enforce § 13-35-227(1), MCA, against corporations who make such expenditures.

17. Pursuant to § 13-37-111, MCA, and § 13-37-128, MCA, the Commissioner is one of the state officers charged with investigating and enforcing § 13-35-227, MCA. Pursuant to § 13-37-113, MCA, the Commissioner may also retain attorneys to prosecute

alleged violations of § 13-35-227, MCA. Therefore, the Commissioner has an interest in this proceeding and the issues herein involved.

18. The current Commissioner has confirmed his opinion that § 13-35-227, MCA, is valid in its entirety. See, <http://www.politicalpractices.mt.gov/content/NoticeofCitizensUnitedSupremeCourtDecision>, dated March 5, 2010, and attached hereto as Exhibit 1. In the past the Commissioner has enforced the prohibition against corporate expenditures found in § 13-35-227(1), MCA.

### **JURISDICTION AND VENUE**

19. Jurisdiction of this Court arises under § 3-5-302, MCA.

20. Venue in Lewis and Clark County is proper under § 25-2-118, MCA; § 25-2-125, MCA, and/or § 25-2-126, MCA.

### **COUNT 1**

#### **(Declaratory Judgment, § 27-8-101, et. seq., MCA)**

21. The Plaintiffs re-allege all paragraphs within this Complaint and incorporate the same by reference as if repeated in their entirety.

22. Pursuant to the Uniform Declaratory Judgments Act, § 27-8-101, *et seq.*, MCA, the Plaintiffs seek to determine the rights, status, and other legal relations between the parties under § 13-35-227(1), MCA, and other applicable law and administrative rules.

23. Article II, § 7 of the Constitution of the State of Montana states in part, "No law shall be passed impairing the freedom of speech or expression. Every

person shall be free to speak or publish whatever he will on any subject."

24. The First Amendment to the Constitution of the United States of America states, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

25. "Speech", includes political speech. In fact, laws that burden political speech are subject to strict scrutiny, which requires the Defendants to prove that the restriction furthers a compelling state interest and is narrowly tailored to achieve that interest.

26. The laws protecting political speech extend to corporations: "[P]olitical speech does not lose its First Amendment protection 'simply because its source is a corporation.'" Citizens United v. Federal Election Commission, \_\_ S.Ct.\_\_, 2010 WL 83856, \*20 (citations omitted).

27. § 13-35-227(1), MCA, infringes upon the Plaintiffs' political speech freedoms under both the Montana and United States Constitution because § 13-35-227(1), MCA, prohibits the Plaintiffs (and, in fact, all corporations) from making expenditures that support or oppose apolitical candidate or political committee, thereby limiting and restricting the Plaintiffs' ability to engage in political speech. The statute does not prohibit persons other than corporations (such as individuals, unincorporated businesses, unions, or the media) from making the same expenditures and thereby engaging in political

speech.

28. § 13-35-227(1), MCA, treats corporations different from other persons, thereby resulting in the State of Montana's use of its full power to command where and from what source people get their information. This is nothing more than unlawful censorship.

29. The State of Montana does not have a compelling governmental interest for infringing on the Plaintiffs' lawful political speech freedoms, and § 13-35-227(1), MCA, is not narrowly tailored to achieve a compelling state interest.

30. The Plaintiffs pray for relief as set forth in the Prayer For Relief, below.

## COUNT 2

### (42 U.S.C. § 1983)

31. The Plaintiffs re-allege all paragraphs within this Complaint and incorporate the same by reference as if repeated in their entirety.

32. At all times relevant herein, the conduct of the Defendants was subject to Title 42, United States Code, § 1983, et. seq., which states:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper



proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

33. The Defendants' enforcement of § 13-35-227(1), MCA, is a deprivation of the Plaintiffs' rights under the First and Fourteenth Amendments of the United States Constitution and is imposed under the color of state law in violation of Title 42, United States Code, § 1983, et seq.

34. The Plaintiffs have been damaged as a result of their inability to engage in political speech through the use of corporate expenditures; and they will continue to be damaged by the enforcement of § 13-35-227(1), MCA.

35. The Plaintiffs pray for relief as set forth in the Prayer For Relief, below.

### **COUNT 3**

**(Preliminary Injunction, § 27-19-101, et. seq.  
MCA)**

36. The Plaintiffs re-allege all paragraphs within this Complaint and incorporate the same by reference as if repeated in their entirety.

37. The Plaintiffs are materially and adversely affected by § 13-35-227(1), MCA, since they cannot speak out on candidates or issues affecting citizens

of America and residents of Montana without fear of being penalized by the State of Montana through the enforcement of § 13-35-227(1), MCA, and § 13-37-128, MCA.

38. Plaintiffs will not be allowed to exercise their constitutional right to engage in political speech and will suffer irreparable injury and loss unless the enforcement of § 13-35-227(1), MCA, and § 13-37-128, 1), MCA, and § 13-37-128, MCA are restrained pending final adjudication and determination of the matters and issues of the matters herein set forth. Plaintiffs have no adequate remedy other than by obtaining injunctive relief.

39. The Plaintiffs pray for relief as set forth in the Prayer for Relief, below.

#### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs demand judgment against the Defendants as follows:

a. For an order pursuant to § 27-19-201, MCA, restraining and enjoining the Defendants and each of them, their agents and servants (including, but not limited to, the county attorneys) from exercising any of the powers, rights, or duties respecting the ban against corporate expenditures as set forth in §13-35-227(1), MCA, including, but not limited to, using § 13-37-128 to enforce such a ban against corporate expenditures, pending the final determination of the issues stated herein;

b. For a judgment declaring that the prohibition against corporate expenditures as set forth in § 13-35-227(1), MCA, violates Article II, § 7, of the Constitution of the State of Montana and the First Amend-

ment of the United States Constitution, and is illegal, unconstitutional, and without the force of law; and for attorney fees and other supplemental relief under § 27-8-313, MCA, that is necessary and proper;

c. For a judgment declaring that the Plaintiffs are not required to comply with the ban against corporate expenditures found in § 13-35-227(1), MCA, since the ban is illegal, unconstitutional, and unenforceable;

d. For a judgment in favor of the Plaintiffs on their claim under 42 U.S.C. § 1983; and for actual, general, special, compensatory damages in an amount to be determined, plus the costs of this action, including attorney fees and costs;

e. For damages, costs, and attorney fees as allowed by law or equity;

f. For any other further relief deemed just and proper by the Court.

Respectfully Submitted this 14th day of April, 2010.

/S/ Margot E. Barg

Margot E. Barg

Attorney for the Plaintiffs

# **OPPOSITION BRIEF**

**In The  
Supreme Court of the United States**

**AMERICAN TRADITION PARTNERSHIP, INC., f.k.a.  
WESTERN TRADITION PARTNERSHIP, INC., et al.,**

*Petitioners,*

v.

**STEVE BULLOCK, ATTORNEY  
GENERAL OF MONTANA, et al.,**

*Respondents.*

**On Petition For Writ Of Certiorari  
To The Supreme Court Of The  
State Of Montana**

**BRIEF IN OPPOSITION**

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## QUESTION PRESENTED

Whether the Montana Corrupt Practices Act, which requires natural persons associating as business corporations to contribute to and account for political campaign expenditures through a segregated fund of voluntary contributions, violates the First Amendment in light of the minimal burdens imposed by the Act, significant differences between state and federal elections, unrefuted evidence of actual and likely corruption in Montana's elections, and experience elsewhere since this Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE PETITION .....	8
I. THE COURT BELOW APPLIED <i>CITIZENS UNITED</i> TO THE FACTS BEFORE IT .....	10
A. The Corrupt Practices Act Does Not Ban or Severely Burden Petitioners' Speech.....	11
B. Any Burden Imposed By the Corrupt Practices Act Satisfies Constitutional Scrutiny .....	17
1. Montana Has Compelling State Interests in Preventing Corruption and Maintaining Accountability in State Elections.....	19
a. A State Has a Distinct Duty to Preserve its Citizens' Political Community.....	22
b. State Elections Are Distinctly Susceptible to Corrupting Influences .....	24
c. States Have Distinct Powers and Needs to Regulate Corporations Effectively.....	28
2. The Corrupt Practices Act Is Narrowly Tailored to Montana's Interests.....	32

## TABLE OF CONTENTS - Continued

	Page
II. THE QUESTION PRESENTED SHOULD BE DECIDED ON THE MERITS, IF AT ALL .....	34
CONCLUSION.....	39

## TABLE OF AUTHORITIES

	Page
CASES	
<i>American Tradition Partnership, Inc. v. Bullock</i> , No. 11A762, 2012 WL 521107 (U.S. Feb. 17, 2012) .....	8, 10
<i>Arizona Christian Sch. Tuition Org. v. Winn</i> , 131 S. Ct. 1436 (2011) .....	37
<i>Ashland Oil, Inc. v. Tax Commissioner of West Virginia</i> , 497 U.S. 916 (1990) .....	38
<i>Bluman v. Federal Election Comm'n</i> , 800 F. Supp. 2d 281 (D.D.C. 2011) .....	18, 22
<i>Caperton v. A.T. Massey Coal</i> , 556 U.S. 868 (2009) .....	26
<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010) .....	passim
<i>Connally v. Georgia</i> , 429 U.S. 245 (1977) .....	38
<i>Cort v. Ash</i> , 422 U.S. 66 (1975) .....	29
<i>El Vocero de Puerto Rico v. Puerto Rico</i> , 508 U.S. 147 (1993) .....	38
<i>Emily's List v. FEC</i> , 581 F.3d 1 (D.C. Cir. 2009) .....	34
<i>Federal Election Comm'n v. Beaumont</i> , 539 U.S. 146 (2003) .....	31

## TABLE OF AUTHORITIES – Continued

	Page
<i>Federal Election Comm'n v. Colorado Republican Campaign Comm., 533 U.S. 431 (2001)</i> .....	31
<i>Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)</i> .....	14, 17, 33
<i>Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007)</i> .....	10
<i>First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)</i> .....	18
<i>Greene v. Georgia, 519 U.S. 145 (1996)</i> .....	38
<i>Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010)</i> .....	18
<i>International Ass'n of Machinists v. Street, 367 U.S. 740 (1961)</i> .....	30
<i>Kaup v. Texas, 538 U.S. 626 (2003)</i> .....	38
<i>Long Beach Chamber of Commerce v. Long Beach, 603 F.3d 684 (9th Cir. 2010)</i> .....	33
<i>McConnell v. Combination Mining &amp; Milling, 30 Mont. 239, 76 P. 194 (1904), modified on other grounds, 31 Mont. 563, 79 P. 248 (1905)</i> .....	28, 29
<i>McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003)</i> .....	10, 18



## TABLE OF AUTHORITIES – Continued

	Page
<i>McDonald v. City of Chicago</i> , 130 S. Ct. 3020 (2010).....	23, 24
<i>New Mexico v. Reed</i> , 524 U.S. 151 (1998).....	38
<i>North Carolina Right to Life v. Leake</i> , 525 F.3d 274 (4th Cir. 2008) .....	33
<i>Northwest Austin Municipal Utility Dist.</i> <i>No. 1 v. Holder</i> , 557 U.S. 193 (2009).....	20
<i>Ohio v. Reiner</i> , 532 U.S. 17 (2001).....	38
<i>Paul v. Virginia</i> , 75 U.S. 168 (1869), overruled on other grounds, <i>United States</i> <i>v. South-Eastern Underwriters Assn.</i> , 322 U.S. 533 (1944).....	22
<i>Personal PAC v. McGuffage</i> , No. 12-CV-1043, 2012 U.S. Dist. LEXIS 33553 (N.D. Ill. Mar. 13, 2012).....	39
<i>Planned Parenthood of Southeastern</i> <i>Pennsylvania v. Casey</i> , 505 U.S. 833 (1992).....	35
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	23
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	32
<i>Randall v. Sorrell</i> , 548 U.S. 230 (2006).....	16, 35

## TABLE OF AUTHORITIES – Continued

	Page
<i>Rose v. Arkansas State Police</i> , 479 U.S. 1 (1986).....	38
<i>Santa Fe Indus. v. Green</i> , 430 U.S. 462 (1977).....	29
<i>Seven-Sky v. Holder</i> , 661 F.3d 1 (D.C. Cir. 2011).....	37
<i>SpeechNow.org v. FEC</i> , 599 F.3d 686 (D.C. Cir. 2010).....	33
<i>Sugarman v. Dougall</i> , 413 U.S. 634 (1973).....	23
<i>Thalheimer v. City of San Diego</i> , 645 F.3d 1109 (9th Cir. 2011).....	33
<i>Trevino v. Texas</i> , 503 U.S. 562 (1992).....	38
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	24
<i>West Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943), <i>overruling</i> <i>Minersville</i> <i>School District v. Gobitis</i> , 310 U.S. 586 (1940) <i>and NLRB v. Jones &amp; Laughlin Steel Corp.</i> , 301 U.S. 1 (1937), <i>backing away from A.L.A.</i> <i>Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935).....	37
<i>Western Tradition Partnership v. Attorney</i> <i>General</i> , 2011 MT 328 (DA 11-0081) .....	30
<i>Wisconsin Right to Life State PAC v. Barland</i> , 664 F.3d 139 (7th Cir. 2011).....	33

## TABLE OF AUTHORITIES – Continued

	Page
<b>FEDERAL MATERIALS</b>	
<b>Internal Revenue Code</b>	
§ 162(e) .....	4
<b>United States Code</b>	
Tit. 2, § 441b(b)(2)(c) .....	12
<b>United States Constitution</b>	
amend. I .....	<i>passim</i>
amend. IV .....	38
amend. V .....	38
amend. VI .....	38
amend. X .....	23
amend. XIV .....	23, 38
art. III, § 2 .....	37
art. IV .....	38
art. IV, § 2 .....	22
art. IV, § 4 .....	23
art. VI, § 2 .....	37
<b>MONTANA MATERIALS</b>	
<b>Administrative Rules of Montana</b>	
Rule 44.10.327 .....	1, 2, 13
Rule 44.10.531(4) .....	2
Rule 44.10.405 .....	2

## TABLE OF AUTHORITIES - Continued.

	Page
<b>Montana Code Annotated</b>	
§ 7-4-2203 .....	25
§ 13-1-101(20).....	12
§ 13-1-101(22).....	1, 5, 12, 13
§ 13-35-227(1).....	1
§ 13-35-227(3).....	1, 12, 16
§ 13-37-128(1).....	14
§ 13-37-201 .....	15
§ 15-31-114(1)(a).....	4
§ 70-30-102 .....	32
<b>Montana Constitution</b>	
art. II, § 8.....	24
art. II, § 9.....	24
art. V, § 3 .....	25
art. VI, § 2 .....	25
art. VII, § 8 .....	25
art. XI, § 3.....	25
<b>1979 Montana Laws</b>	
Ch. 404.....	1
<b>1913 Montana Laws</b>	
Ch. 604, Init. Act. Nov. 1912, § 25 .....	<i>passim</i>

## TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
Form C-2, <i>available at</i> <a href="http://politicalpractices.mt.gov/content/pdf/5cfp/fillC-2COMPLETE.pdf">http://politicalpractices.mt.gov/content/pdf/5cfp/fillC-2COMPLETE.pdf</a> .....	2, 12
Larry Howell, <i>Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings</i> , 73 Mont. L. Rev. 25 (2012).....	26
Lucian A. Bebchuk & Robert J. Jackson, Jr., <i>Corporate Political Speech: Who Decides?</i> , 124 Harv. L. Rev. 83 (2010).....	30
Robert Hall, <i>Free Speech and Free Elections</i> , 3 First Amend. L. Rev. 173 (2004).....	27
The Federalist No. 10 (James Madison) (Henry Cabot Lodge ed. 1888).....	20



## STATEMENT OF THE CASE

This case concerns the Corrupt Practices Act of 1912, enacted by the People of Montana through ballot initiative. Init. Act. Nov. 1912, § 25, 1913 Mont. Laws at 604. That act prohibited certain business corporations from "pay[ing] or contribut[ing] in order to aid, promote or prevent the nomination or election of any person." *Id.* After legislative clarification in 1979, current law provides that business corporations make campaign contributions and expenditures by accounting for and disclosing them through a separate, segregated fund of voluntarily solicited contributions from shareholders, employees, and members. See Mont. Code Ann. § 13-35-227(3); cf. 1979 Mont. Laws 1011, ch. 404. "A corporation may not make . . . an expenditure" not so funded and accounted for. Mont. Code Ann. § 13-35-227(1).

The Commissioner of Political Practices administers the Corrupt Practices Act to further accountability and transparency in a minimally burdensome manner. Every group making independent campaign expenditures qualifies as either a political action committee (if it has a primary purpose to influence elections) or an incidental committee (if it does not have a primary purpose of influencing elections). See Mont. Code Ann. § 13-1-101(22) (defining political committee); Mont. Admin. R. 44.10.327 (political committee types). Each group files the same simple two-page disclosure form, and periodic short-form expenditure disclosures as appropriate, whether it

constitutes an unincorporated association of individuals, an incorporated voluntary association, or a business corporation. See Mont. Admin. R. 44.10.327, 44.10.405 (statement of organization), & 44.10.531(4) (independent expenditure reporting); cf. Form C-2, available at <http://politicalpractices.mt.gov/content/pdf/5cfp/fillC-2COMPLETE.pdf>.

The Petitioners are an incorporated voluntary association (Montana Shooting Sports Association, "MSSA"), an incorporated sole proprietorship (Champion Painting, "Champion"), and a foreign corporation registered to do business in Montana (American Tradition Partnership, formerly Western Tradition Partnership, "ATP"). App. 6a-7a. They filed this action on March 8, 2010, and an Amended Complaint dated April 15, 2010. Pet. 4; App. 115a. They conducted no discovery prior to moving for summary judgment, and instead presented two affidavits consisting of less than six double-spaced pages of conclusory testimony from the principals of MSSA and Champion. App. 13a. The State cross-moved on the basis of an extensive record, including depositions of the Petitioners' principals, affidavits detailing the function of the Corrupt Practices Act, and expert affidavits from historians, public officials – Republicans and Democrats – and campaign finance analysts. *Id.* Plaintiffs did not rebut these facts. *Id.*

The district court granted summary judgment to the Petitioners on October 18, 2010. App. 109a. The Montana Supreme Court reversed. App. 32a-33a. It relied on a close reading of *Citizens United v. Federal*

*Election Comm'n*, 130 S. Ct. 876 (2010), citing it two dozen times in concluding that “[t]he District Court erroneously construed and applied the *Citizens United* case.” App. 10a. In its own application of the case, it considered this Court’s careful analysis of the record and the particular burdens imposed by the federal law and the federal regulatory system on federal campaigns. App. 10a-12a. The Montana court expressly adopted and applied the strict scrutiny analysis required by *Citizens United*, App. 12a-13a, as well as by the Montana Constitution, App. 24a-25a. The court distinguished *Citizens United* on three primary grounds.

First, the court relied on the Petitioners’ various admissions and unrefuted evidence that their core political speech was neither banned nor abridged in any material way. It found “the statute has no or minimal impact on MSS[A] and Champion.” App. 31a.

MSSA “has been an active fixture in Montana politics and in the legislative process for many years,” including in candidate campaigns, simply by filing a registration and disclosures under the Act. App. 13a-14a. In 2008, MSSA publicly supported or opposed candidates in every statewide and legislative campaign using its corporate resources in full compliance with the law. Marbut Dep. 53:14-24, 54:25-55:16. Its status as a voluntary association funded by individual members means it is not subject to segregated fund accounting under the law. Baker Aff. ¶ 11; Unsworth Aff. ¶ 17. It chose to use a segregated fund of separate donations that are earmarked for campaign purposes, and therefore reportable as to their source, but it did

not have to; MSSA is free to use its member dues for campaign expenditures. It is precisely the sort of "voluntary association" speech that the Corrupt Practices Act does not regulate. Unsworth Aff. ¶ 15. Thus, as the court explained, the only First Amendment burden MSSA claimed was based on its misreading of laws it has complied with for years. App. 13a-14a, 16a. MSSA therefore suffers no burden at all under the Corrupt Practices Act.

Champion's only claimed First Amendment burden was also based on ignorance of, rather than compliance with, the law: it sought a tax benefit for political expenditures (which is prohibited by other law) and the ability to lend the company's endorsement to campaign speech (which is allowed by the Corrupt Practices Act). App. 14a-15a. As to the former, neither the federal nor state governments allow such a tax benefit. See I.R.C. § 162(e); *see also* Mont. Code Ann. § 15-31-114(1)(a) (corporate deduction for "ordinary and necessary" business expenses). As to the latter claimed burden, the Act allows Champion expressly to endorse a candidate in its own name. Baker Aff. ¶ 10; Unsworth Aff. ¶ 17.

Champion's only actual "burden," then, is that its owner (Kenneth Champion) must make independent expenditures from his personal rather than his corporate checking account, both of which contain his company's money. Champion Dep. 26:15-26:17. In fact, the Act *reduces* Champion's burden, because the corporation would have needed to register as an incidental political committee while Mr. Champion

does not need to do so. See Mont. Code Ann. § 13-1-101(22) (political committee is "two or more individuals or a person other than an individual").

ATP, which presented no evidence of any burden on its political speech, objected primarily to its classification as a political committee subject to full disclosure of its funding sources. App. 15a-16a. ATP, unlike its copetitioners, represents precisely the kind of covert corporate influence the Corrupt Practices Act regulates through its minimal accountability requirements. This is not because it is itself a voluntary association, a 501(c)(4) "nonprofit ideological corporation," Pet. 4. Instead, it is because its status as a nonprofit voluntary association is a shell that conceals undisclosed funding by business corporations that do not themselves account to citizens and shareholders for their campaign spending through a segregated fund. ATP's undisputed purpose is to use the nonprofit corporate form primarily to evade disclosure of funding sources that are themselves out-of-state (and potentially offshore) business corporations that seek to influence Montana elections anonymously. Hoffman Aff. ¶¶ 4-5, Ex. A; Baker Aff. ¶ 12.

Its solicitation to donors revealed how ATP seeks to serve as an anonymous conduit of unaccountable campaign spending:

There's no limit to how much you can give. As you know, Montana has very strict limits on contributions to candidates, but there is no limit to how much you can give to this program. You can give whatever you're



comfortable with and make as big of an impact as you wish.

Finally, we're not required to report the name or the amount of any contribution that we receive. So, if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible. *The only thing we plan on reporting is our success to contributors like you who can see the benefits of a program like this. You can just sit back on election night and see what a difference you've made.*

App. 15a (emphasis added).

Second, the court held that Montana law as administered imposed no significant regulatory burden in general. Unlike the "length, complexity and ambiguity" of the federal laws administered by the Federal Election Commission and addressed in *Citizens United*, compliance with the Corrupt Practices Act only requires "filing simple and straightforward forms or reports." App. 16a. In contrast to the 33 different types of speech covering 71 distinct entities and thousands of pages of regulations and explanatory materials supporting the federal law's criminal sanctions, Montana's simple forms are backed by civil and administrative enforcement oriented at disclosure rather than deterrence. As a result, the record shows that businesses of all sizes are active in Montana politics, ranging from Blue

Cross Blue Shield of Montana to the Tri-County Beverage Hospitality Association of small businesses.

Third, the court recounted the compelling interests that lay behind the adoption of the Corrupt Practices Act, as well as the modern-day political reality that continues to support those compelling interests. They include responding to an extraordinary history of political corruption by out-of-state foreign corporations and interests in the years leading up to the aptly named Act, App. 17a-22a & 25a-26a, maintaining an extraordinarily accessible government in a sparsely populated state, App. 22a-24a & 26a-27a, and preserving citizens' control of and confidence in an elected judiciary, what this Court has held is "a state interest of the highest order," App. 27a-31a. The Montana Supreme Court did not limit its consideration to history; it also detailed testimony on politics as currently practiced in Montana by candidates, electors, and businesses and other interest groups of all sizes. App. 22a-27a.

The court concluded that the distance between the accountable and transparent Montana politics of today and the dark days of Copper Kings confirmed rather than rebutted the People's compelling interest in the Corrupt Practices Act, and that the State's compelling interests remain:

The question then, is when in the last 99 years did Montana lose the power or interest sufficient to support the statute, if it ever did. If the statute has worked to preserve a degree of political and social autonomy is the

State required to throw away its protections because the shadowy backers of WTP seek to promote their interests? Does a state have to repeal or invalidate its murder prohibition if the homicide rate declines? We think not. Issues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government. Clearly Montana has unique and compelling interests to protect through preservation of this statute.

App. 26a. The court entered summary judgment in favor of Montana and against the Petitioners. App. 32a-33a.

Two weeks after the Montana Supreme Court's decision, the Petitioners sought a stay in the Montana Supreme Court. The Montana Supreme Court denied the motion for a stay. App. 113a-114a. On Petitioners' motion, this Court granted a stay pending its consideration of the petition and the merits. See *American Tradition Partnership, Inc. v. Bullock*, No. 11A762, 2012 WL 521107 (U.S. Feb. 17, 2012).

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## REASONS FOR DENYING THE PETITION

The Montana Supreme Court applied rather than defied *Citizens United*. This case is distinguishable

from that case based on the law at issue and the facts in the record. First, the Corrupt Practices Act as administered is not a ban on corporate speech because it does not require the creation of a legal entity separate from the individuals associated in the corporate form. Moreover, there are meaningful qualitative differences between the many substantial burdens imposed on corporate campaign speech by the federal law at issue in *Citizens United* and the minimal burdens imposed on similar speech by the state law at issue here.

Second, as Montana's history attests, corporate independent expenditures can corrupt. Unusually compelling interests motivated the adoption and administration of the Corrupt Practices Act in Montana's state and local elections and those interests remain today. No State in the Union has detailed a more compelling threat of corruption by corporate campaign expenditures than Montana, and the unrefuted testimony presented below establishes that the corruption threat continues against Montana's state and local elections. That threat includes the domination of Montana's small republic by out-of-state, foreign corporations.

In any event, this case presents no basis for the summary reversal Petitioners request. Even if this case holds the great public importance Petitioners ascribe to it, that would be cause for hearing it on the merits. The Act has long been an important part of the Montana political process. The Act's distinctive features would present the Court with an opportunity

to clarify the relatively unsettled doctrine in this area. And the question of whether “experience elsewhere since this Court’s decision in *Citizens United*” justifies reconsideration under its own principles, *American Tradition Partnership v. Bullock*, No. 11A-762 (Feb. 17, 2012) (Stmt. of Ginsburg, J.), cannot and should not be determined summarily. No precedent of this Court supports summary invalidation of a long-established state law so critical to its republican form of government.

# **I. THE COURT BELOW APPLIED *CITIZENS UNITED* TO THE FACTS BEFORE IT.**

In *Citizens United*, this Court held “The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.” *Citizens United*, 130 S. Ct. at 886. “Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” *Id.* at 898, quoting *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.). Campaign finance regulations that “do not prevent anyone from speaking,” on the other hand, are subject to lesser, exacting scrutiny under the First Amendment. *Citizens United*, 130 U.S. at 914, quoting *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003).



Petitioners concede the decision below acknowledged the proper levels of scrutiny. Pet. 12-13. They simply disagree with the substance of the Montana Supreme Court's analysis of the law applied to the facts before it. Yet as that court explained, "the factual record before a court is critical to determining the validity of a governmental provision restricting speech." App. 12a. The record here established that under the minimally burdensome Corrupt Practices Act, Petitioners and business corporations are vocal participants in Montana politics. This is "a material factual distinction between the present case and *Citizens United*." App. 16a. On this record, the court below correctly applied *Citizens United*, consistent with a century of law and practice in Montana and elsewhere, that the Corrupt Practices Act satisfied constitutional scrutiny.

**A. The Corrupt Practices Act Does Not Ban or Severely Burden Petitioners' Speech.**

Whether the Corrupt Practices Act serves as a ban or other severe burden on speech turns on how it designates a corporation as a political committee for accounting and disclosure purposes. If that designation creates "a separate association from the corporation" so as not to "allow corporations to speak," then strict scrutiny applies. *Citizens United*, 130 S. Ct. at 897. In the courts below, however, Petitioners presented no evidence that corporate speech had been "suppressed . . . altogether." Unlike the federal law

that required a corporation to "establish[]" and "administ[er]" a separate segregated fund, 2 U.S.C. § 441b(b)(2)(c), under Montana law a corporation may opt simply to administer its own account of "voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation." Mont. Code Ann. § 13-35-227(3).

Petitioners assert that the decision below "conflicts with the reasoning of *Citizens United*" because a political committee "does not speak for a corporation." Pet. 10. Under the federal law the required political committee was "a separate association from the corporation." *Citizens United*, 130 S. Ct. at 897. That is not true of the Montana law. There is no basis for Petitioners' assertion that the political committee designation establishes "separate legal entities." Pet. 11. Instead, the entity speaking as a "political committee" is the corporation itself, spending the voluntarily contributed funds of corporate principals in the corporate name.

Indeed, the political committee registration and disclosure forms promulgated under the Act recognize that corporations can and do file *as corporations*. Under Montana law, "'Political Committee' means . . . a person" and "'Person' means a[] . . . corporation." Mont. Code Ann. § 13-1-101(22), (20). The Form C-2 "Statement of Organization" required for registration and disclosure of corporate campaign expenditures contains a check-box to indicate whether or not the designated committee itself is incorporated. Cf. Form

C-2, available at <http://politicalpractices.mt.gov/content/pdf/5cfp/fillC-2COMPLETE.pdf>.

Montana's registration and associated disclosure forms are the same minimally burdensome forms any organization (whether or not a business corporation) making independent campaign expenditures would file. See Mont. Code Ann. § 13-1-101(22) (defining political committee; Mont. Admin R. 44.10.327 (political committee types). The testimony of Petitioners themselves established that it takes no more than two minutes to provide the required information to file for a political committee designation, and the Commissioner's office will even fill out the paperwork for a filing corporation. Champion Dep. 9:22-12:9; Baker Aff. ¶ 17. Given these aspects of the law at issue it is, at best, empty formalism to regard the political committee designation as a "separate legal entity."

Based on this misunderstanding of Montana law, Petitioners proceed to read paragraph after paragraph out of this Court's reasoning in *Citizens United* by denying that "the difficulties of federal PAC compliance" mattered to the Court's reasoning. Pet. 11. Unlike the law at issue here, the federal law at issue in *Citizens United* was "an outright ban, backed by criminal sanctions . . . making it a felony for all corporations – including nonprofit advocacy corporations" to engage in electioneering communications. 130 S. Ct. at 907. The Corrupt Practices Act is enforceable through an administrative process and "civil action . . . for an amount up to \$500 or three times the amount of the unlawful contribution or expenditures,

whichever is greater.” Mont. Code. Ann. § 13-37-128(1). Consistent with its original purposes and *Federal Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Act does not apply to nonprofit advocacy incorporations like MSSA, which engages in campaign speech through a corporate form in full compliance with the Act. Neither MSSA nor the other Petitioners cited any of the “classic examples of censorship” under Montana law that this Court cited under federal law. *Citizens United*, 130 S. Ct. at 897.

Petitioners developed no support in the record for their claim that Montana’s filing requirements – the two-page form MSSA has filed under for more than a decade – “remain onerous.” Pet. 11. Unlike the Commissioner’s office, the Federal Election Commission had “adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975.” *Citizens United*, 130 S. Ct. at 895. This complicated regulatory scheme “force[d] speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.” *Id.* at 889. As a result, “smaller or nonprofit corporations cannot raise a voice” under the federal regime. *Id.* at 907. This is demonstrably untrue in Montana, where hundreds of small businesses have been active in Montana politics over the past decade, including the likes of the Dawson-Wibaux County Farm Bureau and the Tri-County Beverage Hospitality Association of businesses. Baker Aff. Exs. A, B. MSSA, the only

one of the three Petitioners who had even bothered to consult Montana's short-form filing requirements for registration and disclosure of campaign expenditures completed them (through its sole employee Gary Marbut, a nonlawyer) without legal or other assistance. Marbut Dep. 68:10-17.

Moreover, while under the federal law "a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign," *Citizens United*, 130 S. Ct. at 898, under Montana law there is no such requirement "for prior permission to speak." *Id.* at 895. Instead, a corporation need only file its registration statement "within 5 days after it makes an expenditure." Mont. Code Ann. § 13-37-201. These administrative burdens are nothing like the "equivalent of prior restraint," *Citizens United*, 130 S. Ct. at 896, and indeed are far less onerous than the political expenditure disclosure required by the Federal Election Commission and endorsed by this Court as "a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 130 S. Ct. at 915.

Thus, Petitioners are unable to evince any cognizable First Amendment harm beyond the *de minimis* task of filing disclosures consistent with the holding of *Citizens United*. See 130 S. Ct. at 916. All any of the three Petitioners have to file to engage in independent expenditures consistent with the Corrupt Practices Act is identical to what they would



need to file for disclosure purposes even if their constitutional claims were successful.

Beyond these simple disclosure filings, the only practical requirement imposed by the law at issue is that a business corporation must voluntarily raise and separately account for the shareholder funds its management seeks to use for campaign expenditures. See Mont. Code Ann. § 13-35-227(3). So understood, the law is more akin to an accounting rule – ensuring the voluntary and transparent funding of campaign expenditures – than censorship. It is critical to a system of “effective disclosure” that “permits citizens and shareholders to react to the speech of corporate entities in a proper way.” *Citizens United*, 130 S. Ct. at 916.

It is this accountability, and not any censorship, that ATP seeks to escape. A foreign out-of-state corporation under Montana law, and a 501(c)(4) corporation under federal law, ATP is “as much the creature[] of law as of traditional forces of speech and association,” formed to “manipulate the system and attract [its] own elite power brokers, who operate in ways obscure to the ordinary citizen.” *Randall v. Sorrell*, 548 U.S. 230, 265 (2006) (Kennedy, J., concurring in the judgment). The Corrupt Practices Act allows corporations to speak as corporations, accountably, but ATP exists to allow corporations to speak through it, unaccountably.

It is undisputed that ATP sold itself to corporate campaign donors as a conduit “for anonymous spending

by others." App. 16a; Hoffman Aff., Ex. A at 33. It is this shell game of one voluntary association in corporate form (ATP) spending the money of another, hidden, business corporation (unknown), that requires a segregated fund to ensure accountability. Such accounting prevents ATP and similar groups "from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Massachusetts Citizens*, 479 U.S. at 264. Its veiled communications hardly convey the "valuable expertise" of ATP's hidden corporate funders, who might otherwise be "the best equipped to point out errors or fallacies in speech of all sorts." *Citizens United*, 130 S. Ct. at 912; cf. Hoffman Aff., Ex. B (Partnership-affiliated flier associating candidate with serial murderers). ATP's function to contravene otherwise valid contribution and disclosure limits is cause for enforcement, not invalidation, of the Act.

#### **B. Any Burden Imposed By the Corrupt Practices Act Satisfies Constitutional Scrutiny.**

In *Citizens United* "[t]he Government d[id] not claim that [corporate independent] expenditures have corrupted the political process in those States" without Corrupt Practices Acts. *Id.* at 909. With respect to the circumstances in Montana before its Corrupt Practices Act, Montana did make that claim below, and does so here. It "has never been doubted" that the People may prevent "the problem of corruption of elected representatives through the creation of political

debts." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

Petitioners treat this Court's conclusion "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," *Citizens United*, 130 S. Ct. at 909, as an axiom rather than a claim about how politics actually works. Pet. 16. Yet rather than an irrefutable "matter of law" as Petitioners contend, *id.*, this Court grounded this factual premise in the federal presidential campaign "speech here in question," Congress's findings, and the extensive record in *McConnell v. Federal Election Comm'n* concerning federal law and federal elections. *Citizens United*, 130 S. Ct. at 909-10. This case presented to the court below a more developed and distinct record of state politics.

Petitioners' reading of *Citizens United* to hold that "only quid-pro-quo corruption [i.e., bribery] can justify restricting core political speech," Pet. 19, also is inconsistent with this Court's more recent decisions. See *Bluman v. Federal Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011), *affirmed*, No. 11-275 (Jan. 9, 2012) (protecting the overall process of democratic self-government is a compelling state interest sufficient to ban campaign expenditures); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (protecting national security is a compelling state interest sufficient to ban political advocacy coordinated with designated terrorist groups). If the Court had declared a rule of unconstitutionality *per se*, rather

than a balancing based on the relevant burdens on speech, these cases would have come out the other way. Such a balancing also is appropriate here.

**1. Montana Has Compelling State Interests in Preventing Corruption and Maintaining Accountability in State Elections.**

As the Court below held, geographic, economic, and demographic factors "make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government," App. 26a. Petitioners now deride this reality as "the Anaconda scare." Pet. 15. Yet they have not disputed it.

The compelling historical interests for the enactment of the Corrupt Practices Act are unmistakable. A century ago, Montanans acted to take back their state government after the Copper Kings' corporate interests had controlled the political sphere for decades. Fritz Aff. ¶¶ 4-5; 14-25, 28; Brown Aff. ¶ 21. No less than the United States Senate "expressed horror at the amount of money which had been poured into politics in Montana." Fritz Aff. ¶ 14. Foreign corporations extorted special interest favors from Montana lawmakers through "naked corporate blackmail of a sovereign state." Fritz Aff. ¶¶ 15-16, 21-23. These corporate interests expended as much as \$1000 per vote (in today's dollars) to influence elections. Fritz Aff. ¶¶ 17-18. That influence bled into

state campaigns with no federal analogues, such as those of local government officials and judges who, notwithstanding their relatively small constituencies, possessed substantial authority over corporate interests. Fritz Aff. ¶¶ 19-20.

The Madisonian balance of faction checking faction, *cf. Citizens United*, 130 S. Ct. at 907, remained an unsubstantiated theory because of the enormous natural resource wealth that drew foreign corporate interests (similar to ATPs own patrons) to the Treasure State. Fritz Aff. ¶¶ 15, 21, 29. As the author of the First Amendment observed, small republics like the States are more susceptible to “[t]he influence of factious leaders,” where it is easier than at the federal level “for unworthy candidates to practice with success the vicious arts by which elections are too often carried.” The Federalist No. 10 at 59, 58 (James Madison) (Henry Cabot Lodge ed. 1888). In a small state like Montana, these outside corporations’ campaign expenditures have no connection with our electorate other than the price they put on each vote. Brown Aff. ¶¶ 25-26; Cooney Aff. ¶ 20. Even the Copper King Senator William Clark feared how “[m]any people have become so indifferent to voting [in Montana] by reason of the large sums of money that have been expended in the State.” Fritz Aff. ¶ 19.

As the record below established and the court below found, the State’s compelling interests remain important. *Cf. Northwest Austin Municipal Utility Dist. No. 1 v. Holder*, 557 U.S. 193 (2009) (“current burdens . . . must be justified by current needs”). In



Montana and elsewhere, today's state political campaigns are different in kind, not just degree, from federal campaigns. State elections are many orders of magnitude smaller than federal elections. The \$12 million annual budget of Citizens United, a relatively small player in national politics, is roughly double the total amount raised by every state executive, legislative, and judicial candidate over a biennial election cycle in Montana. *Bender Aff.* ¶ 20. Yet state and local policy may be no less consequential financially to corporations – and may exert no less a pull to harness public policy to private ends.

These distinct conditions of the political systems in the States, reflected in the record and acknowledged in the law, suggest several state interests sufficient to justify any disparate burden on corporate campaign expenditures. First, this Court has long recognized a duty at the federal and state level to preserve the conception of a political community for citizens, who alone are sovereign in the republican form of government. Second, States are especially susceptible to corruption given the nature and number of their elected offices. Third, States retain plenary power to ensure the effective regulation of the corporate form they enable. None of these distinct State interests were before the Court in *Citizens United*.

**a. A State Has a Distinct Duty to  
Preserve its Citizens' Political  
Community.**

The Corrupt Practices Act rests upon a core principle of republican government underlying this Court's hesitancy to embrace foreign campaign expenditures in *Citizens United*. See *id.*, 130 S. Ct. at 911. *Bluman* is particularly instructive on this point. The Court's affirmation in that case could not have relied on any lesser First Amendment rights of foreign persons relative to domestic persons, because as *Citizens United* recognized the primary constitutional harm of such campaign finance restrictions is depriving the listener of information rather than depriving the speaker of a voice. See *id.*, 130 S. Ct. at 908 (it is unlawful for Government "to command where a person may get his or her information or what dis-trusted source he or she may not hear"). Instead, the most reasonable reading of *Bluman* in light of *Citi-zens United* is that government has a compelling interest in regulating non-citizen participation in activities of democratic self-government. See *Bluman*, 800 F. Supp. 2d at 288. Whatever the privileges of "the Citizens of each State" to participate directly in the campaign processes of other States, cf. art. IV, § 2, corporations as corporations do not enjoy the same privilege. See *Paul v. Virginia*, 75 U.S. 168, 177 (1869) ("corporations are not citizens"), overruled on other grounds, *United States v. South-Eastern Un-derwriters Assn.*, 322 U.S. 533 (1944).

Under our federal system, where the States are not mere subsidiaries of the national government, "[t]he Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997). A cornerstone of this federal system is the national government's guarantee of "a Republican Form of Government." U.S. Const., art. IV, § 4. How a State maintains its government under this guarantee must be entitled to some latitude. The power to structure the processes of republican government reserved under the Tenth Amendment "inheres in the State by virtue of its obligation . . . to preserve the basic conception of a political community." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (citations and quotations omitted). Although the First Amendment provides in part that "*Congress* shall make no law . . . abridging the freedom of speech, or of the press," U.S. Const. amend. I (emphasis added), the Bill of Rights applies to the States, where it does, through the Fourteenth Amendment's guarantees of "due process of law" or "privileges or immunities of citizens." U.S. Const. amend. XIV; Pls.' Br. at 12.

While "at least" a corporation "cannot be denied the right to speak on the simplistic ground that it is not 'an individual American,'" *Citizens United*, 130 S. Ct. at 925 (Scalia, J., concurring), the incorporation of the First Amendment's guarantees against the States historically has "varied depending on the person, group, or entity to whom those rights were assigned." *McDonald v. City of Chicago*, 130 S. Ct.

3020, 3064 (2010) (Thomas, J., concurring). The specific scope of those rights must be “deeply rooted in this Nation’s history and tradition.” *Id.* at 3036, citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); see also *McDonald*, 130 S. Ct. at 3050 (incorporation is “a theory that makes the traditions of our people paramount”) (Scalia, J., concurring). Tradition in this case favors the Corrupt Practices Act. This is all the more true where, as here, the citizens themselves, and not any entrenched representatives or faction, have enacted the law at issue.

**b. State Elections Are Distinctly  
Susceptible to Corrupting Influences.**

Little has changed about Montana’s natural resource wealth in the past century, but much has changed in its politics. The Corrupt Practices Act ushered in a robust form of grassroots politics, including participation by businesses large and small. *Fritz Aff.* ¶¶ 27-28; *Cooney Aff.* ¶ 20. That law’s spirit of accountability eventually led to a new Montana Constitution. That Constitution makes paramount the rights of citizen participation in and public information about government proceedings. Mont. Const. art. II, §§ 8, 9. Republican legislator Bob Brown and Democratic legislator Mike Cooney, both former Secretaries of State, attested to this evolution. Unlike the corporate transactional politics that preceded the Act, state campaigns now rely on person-to-person contact across vast distances supported by personal

contributions. Brown Aff. ¶¶ 12-18; Cooney Aff. ¶¶ 9-15; Unsworth Aff. ¶¶ 19-20.

Consistent with this democratization of the state government, the Constitution also provides for direct election of many more officials than are present at the federal level. See Mont. Const. art. V, § 3 (election of legislators); art. VI, § 2 (election of statewide offices); art. VII, § 8 (election of judiciary); art. XI, § 3 (election of local government). Each of these offices presents a different set of policy decisions susceptible to “improper influences from independent expenditures,” from legal actions, licensing, contracting, and land use decisions, to the administration of elections themselves. Brown Aff. ¶¶ 24-26; Cooney Aff. ¶¶ 21-23. In elections for second-tier executive officials like the Secretary of State (charged with administering elections and corporate law) or the Public Service Commission (charged with public utility regulation), “[c]orporations would have a very powerful weapon at their disposal through the use of unlimited independent expenditure[s]” to corrupt executive actions that are “less visible than decisions made in the legislature,” which unequivocally “would have a negative effect on the deliberation” of state officers. Cooney Aff. ¶ 23. The threat of such mischief in the executive branch also extends to quasi-judicial and law-enforcement officials like county attorneys and sheriffs, too. See Mont. Code Ann. § 7-4-2203.

As in most states, Montana voters also select judges in heretofore nonpartisan elections. These elections, wholly unexamined in *Citizens United*, pose



distinct risks of corruption. See *Caperton v. A.T. Massey Coal*, 556 U.S. 868, 873, 876 (2009) (finding that \$3 million in contributions including “\$500,000 on independent expenditures,” more than the total amount spent by individuals or either candidate, could “corrupt [a candidate’s] integrity”) (internal quotations omitted); see generally Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 Mont. L. Rev. 25 (2012). Indeed, in *Caperton* this Court recognized no difference between independent expenditures and contributions in terms of undue influence on the judiciary. *Id.*, 556 U.S. at 885. Montana’s law ensures that such influence over judges and others remains the “extraordinary” acts of a single individual, see *id.* at 886, rather than business as usual. Bender Aff. ¶ 31 and Ex. C. Not even Petitioners claim a right to influence judicial campaigns through corporate expenditures, yet their arguments sweep broadly enough to undermine the integrity of the judicial system as much as the political system.

Thus, as the unrefuted record below established, “Montana state and local politics are more susceptible to corruption than federal campaigns.” Brown Aff. ¶ 24. Without the law the People of Montana enacted as the *Corrupt Practices Act*, the voters’ concern about the appearance of corruption will become worse. Cooney Aff. ¶ 24. The replacement of expenditures from voluntarily solicited and personally accountable funds with unlimited direct corporate campaign expenditures “pose a special threat of

corrupting politics in Montana.” Brown Aff. ¶ 21; see also Fritz Aff. ¶ 29; Brown Aff. ¶¶ 19-26; Cooney Aff. ¶¶ 16-25. Such a corporate takeover of Montana candidate campaigns, motivated only by a fiduciary duty to maximize profit, would “accomplish the same type of corruption of Montana politics” that existed before the Corrupt Practices Act. Brown Aff. ¶ 22; Cooney Aff. ¶ 25. As the dissent below noted, independent expenditures corrupt through a *quid pro quo* of a candidate’s loyalty to those who finance the candidate’s election, regardless of whether those funds pass through the candidate’s own campaign. App. 90a.

Beyond this, independent expenditures allow “implicit threats” against officeholders by corporations; officeholders, fearing massive corporate spending in an election, will vote as the corporations desire even if the officeholder believes it is against the public interest. This is a far less expensive (and less detectable) means of corruption than holding out the prospect of campaign contributions. Indeed, this was one of ATP’s selling points as it solicited corporate money for its election program. See Hoffman Aff. Ex. A at 29-30 (explaining that ATP’s independent expenditure program of attack ads works “with great success” because politicians “usually improve their stance on the issues they felt the most heat on” and “get the message loud and clear when their colleagues get beaten at the ballot box”); see also Robert Hall, *Free Speech and Free Elections*, 3 First Amend. L. Rev. 173, 178 n.17, 188-90 (2004) (describing hog

industry executives threatening legislators for votes against their industry, then outspending political parties to defeat targeted legislators). Such threats are even more pernicious than *quid pro quo* corruption. Threatened corporate expenditures cost nothing, but the threat of expenditures limited only by a corporation's legally mandated profit motive "may be far more effective than withholding a money contribution to the legislator or making a money contribution to the legislator's opponent." Cooney Aff. ¶¶ 21-23; Brown Aff. ¶ 24. In short, "[u]nlimited independent corporate expenditures would have a negative and improper influence on the legislative process." Cooney Aff. ¶¶ 21-22; Brown Aff. ¶ 23.

**c. States Have Distinct Powers and Needs to Regulate Corporations Effectively.**

In 1898, mining company shareholders brought a derivative suit alleging misappropriation of corporate funds for political expenditures to promote "the silver cause" and lobby for the formation of a new county. *McConnell v. Combination Mining & Milling*, 30 Mont. 239, 76 P. 194, 198 (1904), *modified on other grounds*, 31 Mont. 563, 79 P. 248 (1905). The Montana Supreme Court held that the expenditures, made "for strictly political purposes," were *ultra vires*, noting that "[t]he stockholders of the company . . . were not unanimous in their political beliefs. . . ." *Id.* at 199.

Montana's ancient *ultra vires* doctrine, as codified in a more robust form through the Corrupt Practices Act, is exactly the kind of "procedure of corporate democracy" contemplated in *Citizens United*. "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." *Santa Fe Indus. v. Green*, 430 U.S. 462, 479 (1977), quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975). It is the State that provides for incorporation, and the State is in the best position to determine whether and how these procedures "can be more effective today" in helping shareholders "determine whether their corporation's political speech advances the corporation's interest in making profits." *Citizens United*, 130 S. Ct. at 916.

Yet the evolution of state corporate law could not deliver on the promise of corporate democracy. Shareholders suits like *McConnell* were insufficient to prevent corporate managers' use of shareholder funds for political speech that may not represent the shareholders' political beliefs. In Montana, as a practical matter, the Corrupt Practices Act displaced *ultra vires* liability for corporate independent expenditures.

The accountability the segregated fund now provides is even more critical today, when in modern capital markets (just as in labor unions) "the volitional nature of being a shareholder in a public company

does not protect shareholders from the consequences of political speech they disfavor." Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 114 (2010); see *International Ass'n of Machinists v. Street*, 367 U.S. 740, 769 (1961) (construing the Railway Labor Act "to deny 'the power . . . to use [a member's] exacted funds to support political causes which he opposes.'").

When two-thirds of stock in the United States is held by institutional investors, shareholder-citizens are unable to use state-law "procedures of corporate democracy," *Citizens United*, 130 S. Ct. at 911, to influence a corporation's campaign speech. See Br. of Domini Social Invests. LLC at 6, *Western Tradition Partnership v. Attorney General*, 2011 MT 328 (DA 11-0081). As this Court has recognized in the union context, resolving this accountability problem through a voluntary segregated campaign fund "involves no curtailment of the traditional political activities [of the organization]. . . . It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money." *Machinists*, 367 U.S. at 770.

A related difficulty for dissenting shareholders in the absence of a segregated fund requirement is that the use of the corporate form by groups like ATP would render disclosure laws unenforceable. *Unsworth Aff.* ¶ 20; *Baker Aff.* ¶¶ 13-15; *Hoffman Aff.* ¶¶ 4-5, Ex. A. Corporate officers "diverting money" for



campaign expenditures through the corporate treasury could transform the corporation itself into an informal political committee while avoiding disclosure of funding sources. *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003) (citation and quotation marks omitted); *see also Federal Election Comm'n v. Colorado Republican Campaign Comm.*, 533 U.S. 431, 456 (2001) ("all Members of the Court agree that circumvention is a valid theory of corruption"). A segregated fund of voluntary and accountable support for campaign expenditures protects against such diversions.

Complex corporate structures enable evasion of disclosure requirements, coordinated expenditure restrictions, and other unchallenged campaign laws, and absent segregated fund accounting demand an added level of regulatory complexity to rival securities and corporate tax law. *Unsworth Aff.* ¶ 20; *Baker Aff.* ¶¶ 13-16. As the Commissioner testified below, "[u]nlike voluntary associations that may be incorporated but can easily account for the member dues and donations that fund their campaign activities, the volume of transactions and complexity of accounting of business corporations facilitates evasion of campaign finance disclosure requirements." *Unsworth Aff.* ¶ 20. The segregated fund requirement ensures simplified disclosure of only, and more importantly all, money intended for campaign purposes.

## 2. The Corrupt Practices Act Is Narrowly Tailored to Montana's Interests.

The original form of the Corrupt Practices Act applied only to the same kind of corporations that enjoyed "the state-granted monopoly privileges" the Founders resented. *Citizens United*, 130 S. Ct. at 926 (Scalia, J., concurring); see Init. Act. Nov. 1912, § 25, 1913 Mont. Laws at 604. These are the kind of corporations that traditionally have "interfere[d] with governmental functions." *Citizens United*, 130 S. Ct. at 899. Not incidentally, these may be the same kind of corporations ATP is serving: extractive industries to which a captive government may delegate extensive powers of eminent domain. Hoffman Aff. ¶ 5 & Ex. A; see also Mont. Code Ann. § 70-30-102 (enumeration of public uses).

Consistent with the original purpose of the Corrupt Practices Act, Montana's current law has been construed to exclude voluntary associations organized for political advocacy. Unsworth Aff. ¶ 15; see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (in construing local law, the Court is "bound by the construction given to it by" the state supreme court). This policy recognizes that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status," while other corporations may "serv[e] as conduits for the type of direct spending

that creates a threat to the political marketplace." *Massachusetts Citizens*, 479 U.S. at 263-64.

"[T]he speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf," *Citizens United*, 130 S. Ct. at 928 (Scalia, J., concurring) is that of such voluntary associations, not business corporations that enable managers to speak in someone else's name with someone else's money. MSSA, which has engaged in independent campaign expenditures for more than a decade under the Act, is an example of the former. ATP's hidden corporate patrons represent the latter. Montana's compelling interests reinforce the narrow scope of the law over business corporations, while excluding voluntary associations that only incidentally incorporate.

The historical and current application of the Corrupt Practices Act to for-profit business corporations, and the absence of a separate entity requirement, distinguishes the cases involving nonprofits and independent PACs that create Petitioners' alleged "circuit split." Pet. 19-20. See *North Carolina Right to Life v. Leake*, 525 F.3d 274, 277 (4th Cir. 2008) (nonprofit, membership corporation); *Wisconsin Right to Life State PAC v. Barland*, 664 F.3d 139, 144 (7th Cir. 2011) (nonprofit, membership fund); *Long Beach Chamber of Commerce v. Long Beach*, 603 F.3d 684, 687 (9th Cir. 2010) (PAC contribution cap, not segregated fund); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118-19 (9th Cir. 2011) (same); *SpeechNow.org v. FEC*, 599 F.3d 686, 692-96 (D.C. Cir. 2010)

(voluntary association); *Emily's List v. FEC*, 581 F.3d 1, 8 (D.C. Cir. 2009) (non-profit corporation).

## II. THE QUESTION PRESENTED SHOULD BE DECIDED ON THE MERITS, IF AT ALL.

Petitioners make an extraordinary request for summary invalidation of a century-old law in the absence of full briefing and review of the record. Pet. 20. Yet their assertion of this case's "Great Public Importance" exaggerates the effect of the law on "the speech here in question," *Citizens United*, 130 S. Ct. at 908, and, if true, argues for rather than against hearing on the merits. Pet. 20. Even if the Court were to grant the Petition, this is not the rare case meriting summary reversal.

Whether or not this case might be a proper vehicle for reconsidering *Citizens United*, it is ill-suited to summary reversal given the lack of a record establishing any substantial burden on Petitioners' free speech rights. The lead Petitioner ATP literally did not show up in the case below: it all but defaulted on proving its case so as to avoid revealing its funding sources. (The record on ATP was developed through the introduction of authenticated documentary admissions by a party-opponent, produced by a third party.) The testimony of the other two Petitioners, MSSA and Champion, established that the Act imposed no burden on their political speech.

Petitioners' claim that "this case involves the suppression of core political speech protected by the First Amendment," Pet. 20-21, relies on the broadest possible reading of *Citizens United*, one that would deem unconstitutional all state regulation of corporate independent expenditures as a "ban." There is no need to read that case so broadly, and therefore no need to reconsider it in light of the above distinctions between the federal and Montana laws.

And even on the broadest reading of *Citizens United*, this case presents an opportunity for the Court to clarify its application. While Petitioners urge a *stare decisis* analysis under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Pet. 24, that particular framework played no part in *Citizens United* itself. Instead, the Court's departure from precedent reflected the dynamic development of campaign finance legislation (and related First Amendment doctrine), and in particular the fact that "[t]he universe of campaign finance regulation is one this Court has in part created and in part permitted by its course of decisions." *Randall v. Sorrell*, 548 U.S. 230, 264 (2006) (Kennedy, J., concurring in the judgment).

In this area of the law, a claim that is "not well reasoned" or "undermined by experience," *Citizens United*, 1303 S. Ct. at 912, or that is supported by "[n]o serious reliance interests," *id.* at 913, or is so controversial as to undermine the claim's "ability to contribute to the stable and orderly development of the law," *id.* at 922 (Roberts, C.J., concurring), may



merit reconsideration. Montana is free to offer, and the Court is "free to accept," new arguments and evidence to support a Corrupt Practices Act that has not been the subject of judicial review until this case. *Id.* at 924 (Roberts, C.J., concurring). Whether the court below properly accepted Montana's arguments should be assessed on the merits of the case, and not simply the assertions in the Petition. The best means by which this Court can "decide when reconsideration of a decision is warranted," Pet. 23, is by reviewing that decision on the merits, not just the Petition.

For example, Petitioners claim that "most of the 'huge sums' being spent by super PACs are not from corporations," and that this suggests the Court in *Citizens United* expected more political spending from corporations. Pet. 28. Yet the same evidence could just as well suggest that the Court overestimated the chill to corporate campaign speech under the previous federal regime. At the very least, given the inefficacy of current disclosure rules, it is too soon to tell the impact of corporate campaign expenditures based on a snapshot taken at the time of the Petition. That scene will continue to develop as the next election draws near. Thus the Petition, laden with fluid, non-record facts adduced from recent political websites, suggests reasons to reexamine, rather than ratify, Petitioners' thinly supported factual predicates. Pet. 28-30.

As was recently observed about a similarly momentous issue, "history and precedent counsel

caution before reaching out to decide difficult constitutional questions too quickly, especially when the underlying issues are of lasting significance." *Seven Sky v. Holder*, 661 F.3d 1, 53 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). "After all, what appears to be obviously correct now can look quite different just a few years down the road." *Id.*, citing *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Hughes, C.J.), backing away from *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Hughes, C.J.).

Yet Petitioners unabashedly maintain "[t]he facts are irrelevant." Pet. 32. So framed, a summary invalidation of a law amounts to a veto, not judicial review. "Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision," some framers' failed proposal of a factless federal negative over state and federal laws. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). While the Constitution of the United States is the supreme law of the land, U.S. Const. art. VI, § 2, the "judicial power" can only apply that law to the case Petitioners actually developed – or here, failed to develop – below. U.S. Const. art. III, § 2.

There is therefore no basis for summary reversal of the judgment below. Petitioners reach back across several decades, and hundreds of thousands of

petitions, to find only a handful of summary reversals. None of them fit this case. Like the more recent summary reversals, *Stay Opp'n* at 9-10, most of these cases involved long-established rules of criminal procedure, a far cry from the constitutional challenge to a century-old law presented here. See *Kaup v. Texas*, 538 U.S. 626 (2003) (Fourth Amendment arrest); *Ohio v. Reiner*, 532 U.S. 17 (2001) (Fifth Amendment self-incrimination); *New Mexico v. Reed*, 524 U.S. 151 (1998) (Article IV extradition); *Greene v. Georgia*, 519 U.S. 145 (1996) (Sixth Amendment juror bias); *Trevino v. Texas*, 503 U.S. 562 (1992) (Fourteenth Amendment peremptory challenge discrimination). See also *Ashland Oil, Inc. v. Tax Commissioner of West Virginia*, 497 U.S. 916 (1990) (retroactivity of civil constitutional decision); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (constitutionality, under First Amendment, of criminal procedural rule); *Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (statutory preemption); *Connally v. Georgia*, 429 U.S. 245 (1977) (Fourth Amendment search and Fourteenth Amendment due process). All of them are *per curiam*. All but one of them are without dissent. See *Rose*, 479 U.S. at 5 (Marshall, J., dissenting).

Finally, and contrary to Petitioners' speculation, the disposition most likely to "pose[] the prospect of considerable litigation," Pet. 21, is summary reversal. Such a reversal, lacking a basis in the full record and arguments of parties, would do little to answer the disputed questions Petitioners raise about the application of *Citizens United* in state, local, and judicial

elections. Pet. 22-23, *quoting Personal PAC v. McGuffage*, No. 12-CV-1043, 2012 WL 850744, \*4 (N.D. Ill. Mar. 13, 2012) ("If the Supreme Court grants a writ of *certiorari* in the Montana case, the parameters of *Citizens United* as applied to political climates of individual states may be explained.") (*quotation omitted*).

---

## CONCLUSION

The petition should be denied. In the alternative, the Court should grant *certiorari* for full briefing and argument on the merits.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**



RECORD  
AND  
BRIEFS

No. 11-1179

Supreme Court, U.S.  
FILED

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IN THE

**Supreme Court of the United States**

AMERICAN TRADITION PARTNERSHIP, INC., f.k.a.  
WESTERN TRADITION PARTNERSHIP, INC., et al.,  
*Petitioners,*

*v.*

STEVE BULLOCK, ATTORNEY  
GENERAL OF MONTANA, et al.,  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MONTANA

**BRIEF OF THE CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA AS AMICUS  
CURIAE IN SUPPORT OF PETITIONERS**

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## TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS .....	i
TABLE OF CITED AUTHORITIES .....	iii
<b>BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS.....</b>	<b>1</b>
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	7
<b>I. THE COURT SHOULD GRANT         THE PETITION AND SUMMARILY         REVERSE THE MONTANA SUPREME         COURT. ....</b>	<b>7</b>
<b>A. The Montana Supreme Court's             Decision Upholding a Complete Ban on             Corporate Political Speech Undeniably             Conflicts With <i>Citizens United</i> .....</b>	<b>7</b>
1. The Montana Supreme Court's decision conflicts with the holding of <i>Citizens United</i> that a complete ban on corporate political speech violates the First Amendment ....	7

*Table of Contents*

	<i>Page</i>
2. <i>Citizens United</i> squarely rejected every one of the Montana Supreme Court's reasons for upholding the state law under review. ....	10
B. Summary Reversal Is The Appropriate Remedy. ....	13
II. MONTANA'S REPEATED REFUSAL TO FOLLOW THIS COURT'S DECISIONS MAKES SUMMARY REVERSAL PARTICULARLY APPROPRIATE IN THIS CASE. ....	16
III. NOTHING THAT HAS OCCURRED SINCE <i>CITIZENS UNITED</i> PROVIDES A BASIS FOR RECONSIDERING THE DECISION. ....	21
CONCLUSION .....	23

## TABLE OF CITED AUTHORITIES

	<i>Page</i>
<b>FEDERAL CASES</b>	
<i>Arkansas v. Sullivan</i> , 532 U.S. 769 (2001) .....	14
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	8, 12, 22
<i>C &amp; C Plywood Corp. v. Hanson</i> , 583 F.2d 421 (9th Cir. 1978) .....	18
<i>Caperton v. A.T. Massey Coal Co.</i> , 129 S. Ct. 2252 (2009) .....	12
<i>Chamber of Commerce of the United States v.</i> <i>FEC</i> , 69 F.3d 600 (D.C. Cir. 1995) .....	2
<i>Chamber of Commerce of the United States v.</i> <i>Moore</i> , 288 F.3d 187 (5th Cir. 2002) .....	2
<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010) .....	<i>passim</i>
<i>Clafin v. Houseman</i> , 93 U.S. 130 (1876) .....	16
<i>Colorado Republican Federal Campaign</i> <i>Committee v. FEC</i> , 518 U.S. 604 (1996) .....	8

## Cited Authorities

	<i>Page</i>
<i>Connally v. Georgia</i> , 429 U.S. 245 (1977) .....	14
<i>Doctor's Associates, Inc. v. Casarotto</i> , 515 U.S. 1129 (1995) .....	18
<i>Doctor's Associates, Inc. v. Casarotto</i> , 517 U.S. 681 (1996) .....	6, 18
<i>Dodge v. Woolsey</i> , 59 U.S. 331 (1855) .....	21
<i>El Vocero de Puerto Rico v. Puerto Rico</i> , 508 U.S. 147 (1993) .....	14, 15
<i>FEC v. Massachusetts Citizens for Life, Inc.</i> , 479 U.S. 238 (1986) .....	2
<i>FEC v. National Conservative Political Action Committee</i> , 470 U.S. 480 (1985) .....	8
<i>FEC v. Wisconsin Right to Life, Inc.</i> , 551 U.S. 449 (2007) .....	3
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978) .....	3, 6, 8, 17
<i>Haywood v. Drown</i> , 556 U.S. 729 (2009) .....	19



## Cited Authorities

	<i>Page</i>
<i>Howlett By and Through Howlett v. Rose</i> , 496 U.S. 356 (1990) .....	16, 19
<i>Marmet Health Care Center, Inc. v. Brown</i> , 132 S. Ct. 1201 (2012) .....	16
<i>Martin v. Hunter's Lessee</i> , 14 U.S. 304 (1816). ....	16, 20
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003) .....	2
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966) .....	7
<i>Monitor Patriot Co. v. Roy</i> , 401 U.S. 265 (1971) .....	7
<i>Montana Chamber of Commerce v. Argenbright</i> , 226 F.3d 1049 (9th Cir. 2000) .....	18
<i>NAACP v. Button</i> , 371 U.S. 415 (1963) .....	3, 8
<i>N.Y. Times v. Sullivan</i> , 376 U.S. 254 (1964) .....	8
<i>Ohio v. Reiner</i> , 532 U.S. 17 (2001) .....	14

## Cited Authorities

	<i>Page</i>
<i>Oklahoma Publishing Co. v. District Court</i> , 430 U.S. 308 (1977) .....	14
<i>Presley v. Georgia</i> , 130 S. Ct. 721 (2010) .....	14
<i>Republican Party of Minnesota v. White</i> , 536 U.S. 765 (2002) .....	2, 13
<i>Rodriguez de Quijas v.</i> <i>Shearson/American Express, Inc.</i> , 490 U.S. 477 (1989) .....	16
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997) .....	16
<i>Turner v. Department of Employment Security</i> , 423 U.S. 44 (1975) .....	14
<i>United States v. Peters</i> , 9 U.S. (5 Cranch) 115 (1809).....	20
<i>Whitney v. California</i> , 274 U.S. 357 (1927) .....	21
<i>Wisconsin Right to Life, Inc. v. FEC</i> , 546 U.S. 410 (2006) .....	2

## STATE CASES

<i>Casarotto v. Lombardi</i> , 901 P.2d 596 (Mont. 1995).....	18
--	----

*Cited Authorities*

	<i>Page</i>
<b>CONSTITUTION</b>	
U.S. Const. amend. I .....	<i>passim</i>
U.S. Const. art. VI, cl. 2 .....	16
<b>FEDERAL STATUTES</b>	
2 U.S.C. § 441b .....	8, 9, 10
<b>STATE STATUTES</b>	
Mont. Code Ann. § 13-35-227(1) .....	4, 9
Mont. Code Ann. § 13-35-227(3) .....	9
<b>RULES</b>	
Sup. Ct. R. 16.1 .....	13
Sup. Ct. R. 37.2 .....	1-
Sup. Ct. R. 37.6 .....	1
<b>MISCELLANEOUS</b>	
Eugene Gressman <i>et al.</i> , <i>Supreme Court Practice</i> (9th ed. 2007) .....	13
Richard C. Rueben, <i>Western Showdown: Two Montana Judges Buck the U.S. Supreme Court</i> , A.B.A. J., Oct. 1996 .....	19

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief as *amicus curiae* in support of Petitioners American Tradition Partnership, Inc. and Western Tradition Partnership, Inc. ("Petitioners").<sup>1</sup>

### INTEREST OF *AMICUS CURIAE*

The Chamber, founded in 1912, is the world's largest not-for-profit business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. The Chamber's members—from large Fortune 500 companies to home-based, one-person operations—are central to our nation's economy and well-being. The Chamber is incorporated. For purposes of federal and state campaign finance regulation, the Chamber and most of its members are classified as corporations.

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioners and Respondents, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing. Such consents are being submitted herein.

The Chamber plays a key role in advocating for the interests of its members, including their First Amendment rights. In that role, the Chamber was a party to the *McConnell v. FEC*, 540 U.S. 93 (2003), litigation challenging the facial constitutionality of the federal electioneering communication ban on corporate political speech that was overturned in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The Chamber filed two *amicus* briefs in *Citizens United* and regularly files *amicus* briefs where the business community's right to political speech is at stake. See, e.g., *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("WRTL"); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Chamber has litigated to preserve its own First Amendment rights of speech and association in other cases as well. See, e.g., *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

The petition for a writ of certiorari asks the Court to reaffirm the fundamental proposition that lower courts, including state courts, are bound to faithfully apply the Constitution as interpreted by this Court. The Montana Supreme Court, over the emphatic dissent of two justices, nevertheless upheld a state-law ban on corporate political speech materially indistinguishable from the federal law this Court declared unconstitutional in *Citizens United*. Because this Montana statute outlaws the fully protected speech of the Chamber and its members in clear violation of the First Amendment, the Chamber joins Petitioners in urging the Court to grant the petition and summarily reverse the decision below.



## SUMMARY OF ARGUMENT

In *Citizens United*, this Court confirmed once again that the First Amendment does not tolerate suppression of speech based on the speaker's identity, which has the inevitable effect of targeting specific content and viewpoints. "The [First] Amendment is written in terms of 'speech,' not speakers." *Citizens United*, 130 S. Ct. at 929 (Scalia, J., concurring). For decades, this Court has held that corporations—whether not-for-profit or for-profit, whether sole proprietor small businesses or publicly traded corporations—are no exception to that core constitutional principle, and therefore have the right under the First Amendment to engage in political speech. *See id.* at 899-900 (collecting cases); *see, e.g., NAACP v. Button*, 371 U.S. 415, 428-29 (1963); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). The First Amendment guarantees, therefore, that corporations and labor unions have the right to engage in issue advocacy. *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 456-57 (2007) (Roberts, C.J.).

Despite this long history, federal law banned corporations and labor unions from expending general treasury funds on speech expressly advocating for the election or defeat of a candidate for office. In *Citizens United*, this Court struck down that complete ban as flatly inconsistent with the vast majority of campaign-speech precedent and, ultimately, irreconcilable with basic First Amendment principles. "[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Citizens United*, 130 S. Ct. at 913.

In the wake of *Citizens United*, the state laws that track the now-unenforceable federal ban on election-related corporate and labor speech were modified or repealed to meet constitutional requirements. The sole exception is the Montana Supreme Court, which upheld a state law rendering it unlawful for a corporation to “make ... an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or political party.” Mont. Code Ann. § 13-35-227(1). According to the Montana Supreme Court, *Citizens United* is distinguishable because it was decided on its “facts or lack of facts” and “this case concerns Montana law, Montana elections and it arises from Montana history.” Pet. App. 12a-13a. But neither *Citizens United* nor the First Amendment itself makes an exception for Montana.

The Court should grant the petition and summarily reverse the Montana Supreme Court’s decision. Pet. 23-34. Summary reversal is appropriate when the ruling under review is demonstrably incorrect. This case easily meets that standard. Even if legislators and regulators come to believe that a problem somehow warrants censorship, “[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy.” *Citizens United*, 130 S. Ct. at 911. As a matter of law, therefore, no government body—state or federal—can prohibit corporations from using general treasury funds to independently advocate support of or opposition to a candidate for office. The Montana Supreme Court’s attempt to distinguish this case from *Citizens United* on its “facts” is untenable. Every “factual” reason offered as a basis for upholding the Montana ban on corporate speech was soundly rejected in *Citizens United* as a matter of

law “in broad and unqualified language.” Pet. App. 84a (Nelson, J., dissenting). In short, “*Citizens United* is the law of the land” and the Montana Supreme Court “is duty-bound to follow it.” *Id.* at 93a. Because the court did not, “summary reversal on the merits” is the appropriate remedy. *Id.*

Summary reversal is also the appropriate remedy because full briefing and argument would be a waste of the Court’s time and resources. This Court devoted significant resources to briefing, arguing, and then re-briefing and re-arguing *Citizens United*. Briefing and arguing a case that is so obviously controlled by precedent is not only repetitive, but diverts resources from other important cases and wastes time. Indeed, Montana filed an *amicus* brief in *Citizens United* making the same arguments it does here. Additional briefing and argument will not aid the Court in its resolution of this case.

Furthermore, delaying resolution of this case could wrongly signal to lower courts that they can control when this Court reconsiders its decisions simply by refusing to follow controlling precedent. Such a result would not only reward the state court’s derogation of its obligation under the Supremacy Clause to adhere to this Court’s decisions, but would undermine the rule of law. Under Article III, this Court has the singular responsibility of ensuring that States (including state courts) do not disregard federally-protected rights. When those rights are jeopardized, this Court should assert itself swiftly and decisively.

More broadly, summary reversal would remind Montana of the binding effect of this Court’s decisions. Montana has a long and unfortunate history of flouting

controlling precedent. Indeed, it took the Ninth Circuit more than twenty years to bring Montana into compliance with *Bellotti*. And in an apparent act of protest, justices of the Montana Supreme Court refused to sign an order on remand after being twice reversed by this Court in an arbitration case. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). For a system that allows state courts to decide federal issues to function properly, litigants must have confidence that this Court will vigorously exercise its appellate jurisdiction when state courts willfully disregard controlling precedent.

Finally, although Justice Ginsburg agreed that the decision below is inconsistent with controlling precedent and voted to grant the stay, she suggested that the Court should use this case to reconsider *Citizens United* based on the level of election spending that has occurred since 2009. But to the extent that there has been more speech in recent elections, that is a First Amendment good, not an excuse to resurrect a censorship regime. Moreover, it is settled law that independent expenditures do not create the appearance of corruption because there is no coordination between the candidate and the speaker. More briefing and argument will not disturb that fundamental legal conclusion.

In any event, even if new nationwide evidence could justify reconsidering the Court's legal decision—which it does not—the record in this case contains absolutely no evidence regarding corporate political speech since *Citizens United* was decided, much less any evidence that independent political speech is having a corrupting effect. Montana's long-ago experience with corruption, which was unrelated to independent political speech, is not a substitute. Accordingly, this appeal provides no

basis for reconsidering *Citizens United* irrespective of whether one agrees or disagrees with that thorough decision. The Montana Supreme Court's ruling should be summarily reversed as plainly inconsistent with controlling precedent.

## ARGUMENT

### I. THE COURT SHOULD GRANT THE PETITION AND SUMMARILY REVERSE THE MONTANA SUPREME COURT.

#### A. The Montana Supreme Court's Decision Upholding a Complete Ban on Corporate Political Speech Undeniably Conflicts With *Citizens United*.

1. The Montana Supreme Court's decision conflicts with the holding of *Citizens United* that a complete ban on corporate political speech violates the First Amendment.

A "major purpose of [the First Amendment] was to protect the free discussion of government affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Importantly, First Amendment protection for political speech serves the interests of the entire country, not just would-be speakers. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 130 S. Ct. at 898.



"The inherent worth of [such] speech ... does not depend upon the identity of the source, whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777; see, e.g., *Citizens United*, 130 S. Ct. at 899; *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Button*, 371 U.S. at 428-29. Accordingly, this Court has "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United*, 130 S. Ct. at 900 (citation omitted).

Given this history of protecting corporations' First Amendment right to engage in political discourse, any government's "outright ban on corporate political speech" is plainly unconstitutional. *Id.* at 911. Unlike contributions to candidates,<sup>2</sup> "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id.* at 909; *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976) (individuals); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497-98 (1985) (political committees); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (political parties). The federal prohibition on corporate independent expenditures, 2 U.S.C. § 441b, thus violated "the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Citizens United*, 130 S. Ct. at 913.

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2. Contributions to candidates by corporations and labor unions are banned by federal law. See 2 U.S.C. § 441b. That ban was unaffected by *Citizens United* and remains in place.

The Montana statute is materially identical to the federal law declared unconstitutional in *Citizens United*. Like Section 441b, Montana law makes it unlawful for a corporation to “make ... an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or political party” and purports to temper that ban on speech by allowing expenditures through a political action committee (“PAC”). Mont. Code Ann. § 13-35-227(1), (3).<sup>3</sup> The Montana Supreme Court nevertheless upheld the law because “this case concerns Montana law, Montana elections and it arises from Montana history.” Pet. App. 13a. In other words, the court framed *Citizens United* as “decided under its facts or lack of facts” and upheld the total ban on corporate political speech based on “Montana history.” *Id.* at 12a-13a.

As the dissenting Montana justices recognized, however, the decision merely rehashes the arguments that were “presented in the 90-page dissenting opinion of Justice Stevens and emphatically rejected by the majority in *Citizens United*.” *Id.* at 33a (Baker, J., dissenting); *Id.* at 43a-44a (Nelson, J., dissenting) (“[E]very one of ... this Court’s rationales ... was argued, considered, and then flatly rejected by the Supreme Court.”). Instead of trying to circumvent a clear legal decision based on illegitimate and irrelevant factual distinctions, the court

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3. 2 U.S.C. § 441b made it unlawful for a corporation to make an “expenditure in connection with any election” for federal office, *id.* § 441b(a), and extended that ban to any “electioneering communication,” *id.* § 441b(b)(2). Prior to *Citizens United*, the Court had limited the constitutional reach of this ban on electioneering communications. *Wis. Right to Life*, 551 U.S. at 469-70, 481 (Roberts, C.J.). Montana law is so broad that it arguably conflicts with this precedent too.

was “constrained by *Citizens United* to declare [the state law] unconstitutional” because it “prohibits independent corporate expenditures for political speech.” *Id.* at 33a (Baker, J., dissenting).

**2. *Citizens United* squarely rejected every one of the Montana Supreme Court’s reasons for upholding the state law under review.**

The “proof” of the Montana Supreme Court’s “error is found in a comparison of the rationales provided in [its] Opinion with the statements by the Supreme Court rejecting those rationales.” *Id.* at 49a (Nelson, J., dissenting). *First*, the court distinguished *Citizens United* because “under Montana law a [PAC] can be formed and maintained by filing simple and straight-forward forms or reports.” Pet. App. 16a. But this Court made clear that the availability of PACs does not make the outright ban on corporate spending constitutional. As a legal matter, both Section 441b and this Montana statute are “a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.” *Citizens United*, 130 S. Ct. at 897. That conclusion was not dependent on the relative burdens and complexities associated with PAC formation and governance. A PAC is still “a separate association from the corporation” and, therefore, “the PAC exemption ... does not allow corporations to speak.” *Id.* The Montana Supreme Court was not at liberty to disregard this clear legal holding.

*Second*, the Montana Supreme Court extensively relied on the state’s experience with corruption “during the early twentieth century.” Pet. App. 17a-22a. As an initial matter, the examples that the court pointed to

included control over state judges, obtaining a Senate seat through bribery, and consolidated ownership of Montana's newspapers. *Id.* at 17a-20a. But bribery is already illegal, *Citizens United*, 130 S. Ct. at 908, and "it is not clear that any of [these examples] involved independent expenditures," Pet. App. 69a (Nelson, J., dissenting).

In any event, like federal law, Montana law already bans corporate contributions to candidates. *Id.* at 5a. The law under review concerns corporate independent expenditures, which "do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909; *see also id.* at 910 ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors" and "independent expenditures do not lead to, or create the appearance of *quid pro quo* corruption."). Moreover, even accepting the court's unfounded speculation that "independent expenditures by corporations will return Montana to its pre-1912 days of corruption and corporate domination, ... '[a]n outright ban on corporate political speech ... is not a permissible remedy'" as a matter of law. Pet. App. 73a (Nelson, J., dissenting) (quoting *Citizens United*, 130 S. Ct. at 911).

*Third*, the court found that allowing corporations to engage in political speech would distort state elections "by shifting the emphasis to raising funds," *id.* at 22a, and by discouraging "the full participation of the Montana electorate," *id.* at 26a. The assertion that corporate expenditures will distort Montana elections was rejected in *Citizens United* as well: "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 130

S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48-49). The Montana Supreme Court's concern over the shift in focus to fundraising is equally unsustainable. "*Buckley* was specific in stating that the 'skyrocketing cost of political campaigns' could not sustain the governmental prohibition. The First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion.'" *Id.* (emphasis added).<sup>4</sup>

Fourth, and last, the Montana Supreme Court relied on *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), to find that the state "has a compelling interest in protecting and preserving its system of elected judges." Pet. App. 27a. But "[t]he remedy of recusal" in *Caperton* "was based on a litigant's due process right to a fair trial before an unbiased judge. *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." *Citizens United*, 130 S. Ct. at 910. In fact, "Justice Stevens raised this exact issue in his dissent," but "[t]he majority ... remained firm and categorical: the First Amendment does not allow political speech restrictions based on a speaker's

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4. The Montana court was concerned that the "modest election contributions" of individuals would not "meaningfully count" and would be "shut out of the process" by corporate political spending. Pet. App. 27a. As noted above, however, corporations cannot make any contributions to candidates—"modest" or otherwise—under both federal and state law. See *supra* note 2. In addition, looking at "corporate" and "individual" spending as a simple dichotomy is a seemingly convenient, but ultimately inaccurate, way of identifying the source of money used for political speech. "Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, and salary." *Citizens United*, 130 S. Ct. at 906 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 707 (1990) (Kennedy, J., dissenting)).



corporate identity, and speech restrictions aimed at reducing the relative ability of corporations to influence the outcome of elections are invalid." Pet. App. 78a-79a (Nelson, J., dissenting) (citations omitted). Further, the Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), "strongly indicates that the interests cited by the Court here are insufficient for prohibiting corporate speech in judicial elections," Pet. App. 79a (Nelson, J., dissenting).

In sum, "the Court in *Citizens United* (and in *White*) rejected several asserted governmental interests" and the Montana Supreme Court then "retrieved those [same] interests from the garbage can, dusted them off, slapped a 'Made in Montana' sticker on them, and held them up as grounds for sustaining a patently unconstitutional state statute." *Id.* at 84a. The ruling below was "extremely misguided, therefore, in attempting to resurrect the rejected governmental interests under a 'Montana is unique' theory." *Id.* at 84a-85a.

#### B. Summary Reversal Is The Appropriate Remedy.

This is a case in which "summary disposition on the merits" is appropriate. Sup. Ct. R. 16.1; *see also* Pet. 23. This Court has routinely exercised this authority where "the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Eugene Gressman *et al.*, *Supreme Court Practice* 344 (9th ed. 2007).

Exercising that discretion is appropriate where, as here, a state's highest court clearly misapplies controlling Supreme Court precedent on a constitutional question.

*See, e.g., Presley v. Georgia*, 130 S. Ct. 721, 722 (2010) (per curiam) (Georgia Supreme Court “contravened this Court’s clear precedents” under Sixth Amendment); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (Arkansas Supreme Court decision was “flatly contrary to this Court’s controlling precedent” under Fourth Amendment); *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (per curiam) (Ohio Supreme Court ruling “clearly conflicts with” Fifth Amendment precedent); *Okla. Publ’g Co. v. Dist. Court*, 430 U.S. 308, 310 (1977) (per curiam) (summary reversal of Oklahoma Supreme Court was “compelled by [this Court’s] recent decisions” regarding the First Amendment).

The Court also has not hesitated to invalidate state laws by summary disposition. *See, e.g., El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149 (1993) (per curiam) (summarily reversing Puerto Rico Supreme Court decision upholding privacy rule closing preliminary hearings in criminal cases as “irreconcilable” with controlling First Amendment precedent); *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam) (summarily reversing Georgia Supreme Court decision upholding state statute providing a \$5 fee to a magistrate for issuing a requested search warrant as clearly violating the Fourth Amendment); *Turner v. Dep’t of Emp’t Sec.*, 423 U.S. 44, 46 (1975) (per curiam) (summarily reversing Utah Supreme Court decision upholding a state law that was “virtually identical” to another statute this Court had held violated the Fourteenth Amendment).

The summary reversal in *El Vocero* is instructive. In that case, the Puerto Rico Supreme Court upheld the privacy rule based on the “unique history and traditions

of the Commonwealth," notwithstanding a Supreme Court decision invalidating a similar law. 508 U.S. at 149. Because the "distinctions drawn by the court below [were] insubstantial" and its "reliance on Puerto Rican tradition" was "misplaced," this Court summarily reversed and thus struck down the privacy rule "for precisely the reasons stated in" its earlier decision. *Id.* at 149-50. The Court should follow the same course here. For the reasons set forth in the petition, and as further explained above, the various "distinctions drawn" by the Montana Supreme Court are "insubstantial" and "misplaced." The decision below clearly misapplied *Citizens United* and should be summarily reversed "for precisely the reasons stated in" that decision.

Summary reversal also is warranted here because full briefing and argument would waste the Court's time and resources. *Citizens United* painstakingly reviewed the question presented in this case and definitively answered it. *Citizens United* "had two rounds of briefing ... , two oral arguments, and 54 *amicus* briefs" as well as "a comprehensive dissent that ... helped ensure that the Court ... considered all the relevant issues." 130 S. Ct. at 924-25 (Roberts, C.J., concurring). There is no need to plow that ground again. This case offers nothing new for the Court to consider that was not "already rebuffed" in *Citizens United*. Pet. App. 41a (Nelson, J., dissenting). Montana even filed an *amicus* brief in *Citizens United* arguing that the federal ban on corporate speech should be upheld in part based on Montana's history with corruption in the early twentieth century. Pet. 15 (citations omitted). The Court need not refamiliarize itself with Montana history to know that Montana's law plainly conflicts with *Citizens United*.

Finally, full briefing and oral argument would also send a dangerous signal to the lower courts that they set the terms on which this Court reconsiders its precedents. Pet. 23, 32-33. The Court has instructed lower courts to “follow the case which directly controls,” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), precisely because “it is this Court’s prerogative alone to overrule one of its precedents,” *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); see also *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam). If Montana succeeds in forcing reconsideration of this Court’s decision, lower courts will be encouraged to ignore unambiguous controlling precedent and usurp this Court’s prerogative to reconsider precedent, if at all, at the time of its choosing.

## **II. MONTANA’S REPEATED REFUSAL TO FOLLOW THIS COURT’S DECISIONS MAKES SUMMARY REVERSAL PARTICULARLY APPROPRIATE IN THIS CASE.**

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, “[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are,” *Clafin v. Houseman*, 93 U.S. 130, 136 (1876). Article III of the Constitution tasks the Supreme Court with the special responsibility of enforcing that command. See *Martin v. Hunter’s Lessee*, 14 U.S. 304, 347-49 (1816). Only this Court’s appellate review, then, ensures that state courts cannot “dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 371 (1990).

The Montana Supreme Court thus was under a firm obligation here "to acknowledge that the Supreme Court's interpretation of the United States Constitution is, for better or worse, binding on this Court and on the officers of this state, and to apply the law faithfully to the Supreme Court's ruling." Pet. App. 46a (Nelson, J., dissenting). In other words, it was incumbent on the court to resist any temptation to "thumb its nose" at this Court and "boldly ignore the Supremacy Clause." *Id.* (citation omitted). As explained above, however, the court utterly failed in this instance to fulfill its "unflagging obligation, in keeping with the courts' duty to safeguard the rule of law, to honor the decisions of our nation's highest court." *Id.* at 39a-40a (Baker, J., dissenting).

This is not the first time Montana has abandoned its obligation under the Supremacy Clause to implement this Court's decisions. This is the *second* time that Montana has tried to circumvent a Supreme Court decision guaranteeing the political free speech rights of corporations. In 1978, this Court held that Massachusetts violated the First Amendment by banning corporate independent expenditures that advocate for or against referendum proposals. *See Bellotti*, 435 U.S. at 784. As this Court recently explained, *Bellotti* "could not have been clearer" in "reaffirm[ing] the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity." *Citizens United*, 130 S. Ct. at 902.

Yet the Ninth Circuit twice had to remind Montana of this rule by striking down restrictions on corporate political speech. Nearly six months after *Bellotti* was decided, the Ninth Circuit struck down Montana's



analogous law banning corporations from spending general treasury funds to promote or defeat any ballot issue as "an unconstitutional restriction of corporate First Amendment rights." *C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 425 (9th Cir. 1978) ("Under *Bellotti* such blanket infringements of First Amendment rights cannot stand."). Undeterred, Montana later adopted a new law resurrecting the old ban on corporate expenditures in connection with ballot initiative campaigns. Of course, the Ninth Circuit invalidated this law as well, as it too was obviously "controlled by *Bellotti*." *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1055 (9th Cir. 2000).

Montana's recalcitrance is not limited to campaign finance law. In *Doctor's Associates, Inc. v. Casarotto*, 515 U.S. 1129 (1995), this Court granted, vacated, and remanded a Montana Supreme Court decision refusing to enforce a contractual arbitration provision because the provision did not comply with a state law dictating the location of arbitration provisions. On remand, the Montana court simply reinstated its opinion without further briefing or argument. See *Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995). On certiorari again, this Court reversed the Montana Supreme Court and remanded a second time after finding the Montana law was preempted by the Federal Arbitration Act. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

Even after this Court reversed the Montana court twice, however, two Montana justices insisted on a well-publicized and final act of defiance. When the case returned to the Montana Supreme Court for further proceedings, Justices Triewelier and Hunt refused to

sign the routine remand order, boldly declaring that they could not “in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the U.S. Supreme Court’s decision in this and other cases which interpret and apply the Federal Arbitration Act.” Richard C. Rueben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16.

Montana’s penchant for ignoring its obligations under the Supremacy Clause is not a trivial matter. It is a threat to the sensible operation of “a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.” *Howlett*, 496 U.S. at 372-73. The Framers agreed to leave the creation of lower federal courts within the discretion of Congress because state courts would remain open for the resolution of federal claims. See *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (“[S]tate courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law.”). For this system to function, however, all litigants—including corporations—must have confidence that state courts will protect rights guaranteed to them by the Constitution.

Montana argues that summary reversal would not show “due respect” for “sister supreme courts in the states, all of whom are also ‘bound by Oath or Affirmation, to support this Constitution.’” Opp. to App. for Stay at 9, *Am. Tradition P’ship v. Bullock*, No. 11A762 (U.S. Feb. 15, 2012). But Montana has it backwards. If the Montana Supreme Court had shown due respect for its oath to “support, protect and defend the constitution of

the United States," then it would not have "disregard[ed] or parse[d] [*Citizens United*] in order to uphold a state law, while politically popular, is clearly at odds with the Supreme Court's decision." Pet. App. 47a (Nelson, J., dissenting).

In the end, while fashioning a system allowing state courts to decide federal questions, the Framers understood (as this case illustrates) that they would not always jealously guard federal rights. See *Martin*, 14 U.S. at 347. Article III thus empowers the "one Supreme Court" to intercede swiftly and decisively when a state fails to yield to this Court's controlling precedent. "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery ...." *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809). Indeed, this Court's appellate intervention is all the more indispensable when the highest court of a state fails to strike down the offending state law in the first instance:

Without the supreme court, as it has been constitutionally and legislatively constituted, neither the constitution nor the laws of congress passed in pursuance of it, nor treaties, would be in practice or in fact the supreme law of the land, and the injunction that the judges in every State should be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding, would be useless, if the judges of state courts, in any one of the States, could finally determine what was the meaning and operation of the constitution and

laws of congress, or the extent of the obligation of treaties.

*Dodge v. Woolsey*, 59 U.S. 331, 355 (1855).

Summarily reversing the Montana Supreme Court's decision will reassure state-court litigants that this Court will continue to vigilantly exercise the appellate authority entrusted to it by Article III and, moreover, will signal that blatant disregard of controlling precedent will not be tolerated.

### **III. NOTHING THAT HAS OCCURRED SINCE *CITIZENS UNITED* PROVIDES A BASIS FOR RECONSIDERING THE DECISION.**

Contrary to Justice Ginsburg's suggestion, *see Am. Tradition P'ship v. Bullock*, No. 11A762, 2012 WL 521107 (U.S. Feb. 17, 2012) ("Stay Order"), increased spending on political speech, to the extent it is occurring, *but see* Pet. 28-30, is not an unintended and troubling consequence of *Citizens United*. Reaffirming the constitutional right of corporations and labor unions to freely engage in political speech on equal terms was the entire point of the case. The Court properly understood that "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 130 S. Ct. at 911. Thus, the First Amendment requires that any perceived concern with speech must be remedied by "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927). It would be strange indeed if a speaker's decision to vigorously exercise a newly restored First Amendment right to speak could serve as the justification for revoking that right.

It also is incorrect to assume that a corporation's (or anyone's) independent expenditures can improperly "buy candidates' allegiance." Stay Order at 1. As this Court already held, independent expenditures "do not give rise to corruption or the appearance of corruption" as a matter of law. *Citizens United*, 130 S. Ct. at 909. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 908 (quoting *Buckley*, 424 U.S. at 47). "The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials." *Id.* at 901.

But even if the Court were inclined to reconsider *Citizens United* based on empirical data, which it should not, there is no evidence in the record of this case detailing the level of spending on political speech since *Citizens United* was decided. Pet. 27-28. The Montana Supreme Court only considered evidence of corruption in Montana "during the early twentieth century," Pet. App. 17a, and, even then, the evidence had nothing to do with independent expenditures, *see supra* p. 11. Moreover, this Montana-specific evidence offers no insight into the effect or scope of corporate speech in the rest of the country. As this Court is aware, a majority of states permitted corporations to speak freely long before *Citizens United*, yet there was no evidence then (and there is no evidence now) that elections in those states have been corrupted by immense corporate wealth. *Citizens United*, 130 S. Ct. at 909 (citing Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* at 8-9). In short, this case is not a suitable vehicle for addressing the question that Justice Ginsburg posed in the Stay Order.



**CONCLUSION**

For the foregoing reasons, and for those stated by the Petitioners, the Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Montana Supreme Court.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**

No. 11-1179

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IN THE  
**Supreme Court of the United States**

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AMERICAN TRADITION PARTNERSHIP, INC., F.K.A.  
WESTERN TRADITION PARTNERSHIP, INC., ET AL.,  
*Petitioners,*  
v.

STEVE BULLOCK, ATTORNEY GENERAL  
OF MONTANA, ET AL.,  
*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The Supreme Court Of Montana**

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**BRIEF OF CITIZENS UNITED  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS**

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## QUESTION PRESENTED

In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), this Court held that a federal ban on corporate independent political expenditures was unconstitutional under the First Amendment. The Montana Supreme Court, however, upheld a ban on corporate independent political expenditures in Montana state elections because it said that "unlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history." App. 13a. This presents the following issue.

Whether Montana is bound by the holding of *Citizens United*, that a ban on corporate independent political expenditures is a violation of the First Amendment, when the ban applies to state, rather than federal, elections.

# TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	4
I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN <i>CITIZENS</i> <i>UNITED AND NORTHWEST AUSTIN</i> .....	4
A. The Decision Below Squarely Conflicts With The Holding And Reasoning Of <i>Citizens United</i> .....	5
B. The Montana Supreme Court's Reliance On History To Uphold The State's Ban On Corporate Expenditures Conflicts With <i>Northwest Austin</i> .....	10
II. SUMMARY REVERSAL IS THE APPROPRIATE RESPONSE TO THE OBVIOUS CONFLICTS BETWEEN THE DECISION BELOW AND THIS COURT'S CONTROLLING PRECEDENT.....	13
A. Summary Reversal Is Warranted To Correct The Supreme Court Of Montana's Clear Error On An Issue Of National Importance.....	13
B. The Question Whether Current Corporate Expenditures Warrant Reconsideration Of <i>Citizens United</i> Is Not Presented .....	17
CONCLUSION.....	19



## TABLE OF AUTHORITIES

## Page(s)

## CASES

<i>Am. Tradition P'ship v. Bullock</i> , 132 S. Ct. 1307 (2012).....	9, 15, 17
<i>Arkansas v. Sullivan</i> , 532 U.S. 769 (2001).....	14
<i>Ashland Oil, Inc. v. Tax Comm'r of W. Va.</i> , 497 U.S. 916 (1990).....	15
<i>Bobby v. Mitts</i> , 131 S. Ct. 1762 (2011).....	14
<i>Brosseau v. Haugen</i> , 543 U.S. 194 (2004).....	14
<i>California v. Beheler</i> , 463 U.S. 1121 (1983).....	15
<i>Caperton v. A.T. Massey Coal Co.</i> , 129 S. Ct. 2252 (2009).....	10
<i>Citizens United v. Fed. Election Comm'n</i> , 130 S. Ct. 876 (2010).....	<i>passim</i>
<i>Cleveland Bd. of Educ. v. LaFleur</i> , 414 U.S. 632 (1974).....	16
<i>Connally v. Georgia</i> , 429 U.S. 245 (1977).....	16
<i>Cooper v. Aaron</i> , 358 U.S. 1 (1958).....	
<i>CSX Transp., Inc. v. Hensley</i> , 556 U.S. 838 (2009).....	

<i>El Vocero de Puerto Rico v. Puerto Rico</i> , 508 U.S. 147 (1993).....	15
<i>Farris v. Seabrook</i> , 667 F.3d 1051 (9th Cir. 2012).....	6
<i>First Nat'l Bank of Bos. v. Bellotti</i> , 435 U.S. 765 (1978).....	5, 6
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	12
<i>Johnson v. Virginia</i> , 373 U.S. 61 (1963).....	14
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007).....	14
<i>Long Beach Area Chamber of Commerce v.</i> <i>City of Long Beach</i> , 603 F.3d 684 (9th Cir. 2010).....	6
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) .....	17
<i>Marmet Health Care Ctr., Inc. v. Brown</i> , 132 S. Ct. 1201 (2012).....	15
<i>Norfolk &amp; W. Ry. Co. v. Ayers</i> , 538 U.S. 135 (2003).....	13
<i>Nw. Austin Mun. Util. Dist. No. One v.</i> <i>Holder</i> , 129 S. Ct. 2504 (2009).....	<i>passim</i>
<i>Ohio v. Reiner</i> , 532 U.S. 17 (2001).....	15
<i>Oregon v. Mathiason</i> , 429 U.S. 492 (1977).....	15
<i>Pennsylvania v. Bd. of Dirs. of City Trusts of</i> <i>City of Phila.</i> , 353 U.S. 230 (1957) .....	14

<i>Republican Party of Minn. v. White</i> , 536 U.S. 765 (2002).....	3, 6
<i>Rose v. Ark. State Police</i> , 479 U.S. 1 (1986).....	16
<i>Smith v. Spisak</i> , 130 S. Ct. 676 (2010).....	14
<i>Spears v. United States</i> , 129 S. Ct. 840 (2009).....	14
<i>Trs. of the Monroe Avenue Church of Christ v. Perkins</i> , 334 U.S. 813 (1948).....	14
<i>Turner v. Dep't of Emp't Sec. of Utah</i> , 423 U.S. 44 (1975).....	16
<i>Wisc. Right to Life State Political Action Comm. v. Barland</i> , 664 F.3d 139 (7th Cir. 2011).....	6

## CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV .....	5
U.S. Const. art. VI, cl. 2 .....	5, 16

## RULES

Sup. Ct. R. 16.1 .....	13
Sup. Ct. R. 37 .....	1

## OTHER AUTHORITIES

Stephen Breyer, <i>Making Our Democracy Work: A Judge's View</i> (2010) .....	17
<i>The Federalist No. 78</i> (Alexander Hamilton) .....	3
Eugene Gressman et al., <i>Supreme Court Practice</i> (9th ed. 2007) .....	13

**BRIEF OF CITIZENS UNITED  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS**

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**INTEREST OF AMICUS CURIAE\***

Citizens United is a nonprofit membership corporation that has tax-exempt status under 26 U.S.C. § 501(c)(4) as an organization not organized for profit but operated exclusively for the promotion of social welfare. Through a combination of education, advocacy, and grass-roots programs, Citizens United seeks to promote the traditional American values of limited government, free enterprise, strong families, and national sovereignty and security. This case is of central concern to Citizens United because it implicates the rights of corporations to disseminate their political views and is a departure from Supreme Court precedent protecting those rights. Citizens United has challenged similar restrictions in the past, including the restrictions on corporate independent expenditures struck down in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

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\* The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), this Court held that a provision of federal law prohibiting corporations and unions from making independent expenditures supporting or opposing candidates for federal office violated the First Amendment. Yet, in this case, the Supreme Court of Montana upheld Montana's ban on corporate independent expenditures in support of (or opposition to) candidates in state elections, holding that the State had demonstrated that the ban comports with the First Amendment because it is narrowly tailored to further what it described as Montana's "unique[ly]" strong interest in restricting corporate political speech. App. 26a ¶37.

As the two dissenting opinions make clear, that decision cannot be reconciled with the holding or reasoning of *Citizens United*. Justice Baker, for example, recognized that the Montana Supreme Court was bound by *Citizens United* to invalidate Montana's law to the extent it prohibits corporate independent expenditures because "the State of Montana made no more compelling a case than that painstakingly presented in the 90-page dissenting opinion of Justice Stevens and emphatically rejected by the majority in *Citizens United*." App. 33a ¶49. Similarly, as Justice Nelson emphasized, "a fair reading" of *Citizens United* "leads inescapably to the conclusion that every one of the Attorney General's arguments—and [the Montana Supreme Court's] rationales adopting those arguments—was argued, considered, and then flatly rejected by the Supreme Court." App. 43a-44a ¶66. What happened below, he explained, is essentially this:



The Supreme Court in *Citizens United* (and in [*Republican Party of Minn. v. White*], 536 U.S. 765 (2002)) rejected several asserted governmental interests; and this Court has now come along, retrieved those interests from the garbage can, dusted them off, slapped a “Made in Montana” sticker on them, and held them up as grounds for sustaining a patently unconstitutional state statute.

App. 84a ¶120.

This Court’s duty to serve “as the bulwar[k] of a limited Constitution against Legislative encroachments,” *The Federalist No. 78*, at 428 (Alexander Hamilton) (E.H. Scott ed. 1898), is no less strong where a state, rather than federal, statute is at issue. The Supreme Court of Montana’s holding that the First Amendment permits Montana to restrict corporate independent expenditures is flatly at odds with *Citizens United* and the settled First Amendment principle that corporations, no less than individuals, possess the right to participate in the political process. In addition, the Montana Supreme Court’s rationale for distinguishing *Citizens United*—which rested on the supposedly unique history of corporate electioneering in Montana—was expressly rejected in *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504 (2009), where this Court confirmed that history alone is an insufficient ground for sustaining a constitutionally suspect statute.

Having recently and squarely addressed the issue presented in this case, this Court should grant certiorari and summarily reverse the decision of the

Montana Supreme Court. Summary reversal is appropriate to reaffirm the precedential force of *Citizens United*; to disapprove the Montana Supreme Court's transparent attempt to evade this Court's clear mandate; and to confirm once again that vibrant and unrestrained debate among *all* speakers is fundamental to the American political process.

## ARGUMENT

### I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *CITIZENS UNITED* AND *NORTHWEST AUSTIN*.

The Montana Supreme Court—like every other state court—is bound by this Court's holding in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), that it violates the First Amendment to prohibit corporations and unions from making independent expenditures in support of, or opposition to, political candidates. The Montana Supreme Court nevertheless upheld the State's ban on corporate independent expenditures by minimizing the burdens of the Montana prohibition and invoking what it characterized as the State's "unique[ly]" strong anti-distortion and anti-corruption interests. App. 26a ¶37. That decision disregards the clear holding and reasoning of *Citizens United*, which rejected those interests as insufficient to restrict corporate independent expenditures. In addition, the state supreme court's reliance on Montana history to sustain the State's 100-year-old prohibition on corporate independent expenditures is foreclosed by this Court's decision in *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504 (2009).

**A. The Decision Below Squarely Conflicts With The Holding And Reasoning Of *Citizens United*.**

In *Citizens United*, this Court struck down a provision of the Federal Election Campaign Act that, as amended by the Bipartisan Campaign Reform Act ("BCRA"), prohibited corporations and unions from making independent expenditures in support of, or opposition to, candidates for federal office, as well as "electioneering communications" that did not expressly advocate a candidate's election or defeat, but nevertheless referenced a candidate, within 30 days of a primary election or 60 days of a general election. 130 S. Ct. at 913. In so doing, the Court reaffirmed that "political speech does not lose First Amendment protection 'simply because its source is a corporation.'" *Id.* at 900 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)); *see also id.* at 913. The Court explained that the government may not constitutionally restrict political speech based either on the fact that the speaker is organized as a corporation or a desire to equalize the relative ability of speakers to influence elections. *Id.* at 903-04. And, it stated unequivocally that BCRA operated as "a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." *Id.* at 897.

The Supreme Court of Montana's assertion that the decision below is distinguishable because it "concerns Montana law, Montana elections and it arises from Montana history" is untenable. App. 13a ¶16. The First Amendment is a bedrock protection of fundamental rights that restrains government action at all levels. *See* U.S. Const. art. VI, cl. 2; U.S. Const. amend. XIV. There are no state-specific exceptions to the First Amendment's protections for core politi-

cal speech. In fact, this Court has repeatedly struck down state restrictions on political speech under the First Amendment. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that the Minnesota canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violated the First Amendment); *Bellotti*, 435 U.S. at 795 (striking down under the First Amendment a Massachusetts statute forbidding certain expenditures by banks and business corporations related to referendum proposals).

Since *Citizens United*, courts have invalidated state and local restrictions on political speech and expressly recognized *Citizens United*'s applicability to those enactments. See, e.g., *Wisc. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 143 (7th Cir. 2011) (holding that, after *Citizens United*, a Wisconsin statute was "unconstitutional to the extent that it limits contributions to committees engaged solely in independent spending for political speech"); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 695 (9th Cir.) (explaining that the conclusion that a city may not impose financial limits on political action committees' independent expenditures is "compelled by the long and growing line of Supreme Court cases concluding that limitations on independent expenditures are unconstitutional"), *cert. denied*, 131 S. Ct. 392 (2010); see also *Farris v. Seabrook*, 667 F.3d 1051 (9th Cir. 2012), *amended by and reh'g and reh'g en banc denied*, No. 11-35620, 2012 WL 1194154 (9th Cir. Apr. 11, 2012) (affirming a district court's preliminary injunction prohibiting the State of Washington from enforcing its limit on contributions to political com-

mittees supporting the recall of a state or county official).

The decision below—upholding Montana’s ban on corporate independent expenditures—misreads and disregards the unambiguous holding and reasoning of *Citizens United*. Because the state supreme court’s numerous errors have been discussed at length in the dissenting opinions, the stay application, and the petition for certiorari, *amicus* will highlight only a few of the most egregious errors.

*First*, the Montana Supreme Court refused to give force to the basic principle that the First Amendment’s protections for political speech extend to corporations. *Citizens United*, 130 S. Ct. at 899-900. In discussing the burdens imposed by the Montana law, the court avoided the obvious conclusion that the prohibition stifled corporate speech by observing that two individuals—the founder and the sole shareholder of two of the plaintiff corporations—had not “demonstrate[d] any material way in which Montana law hindered or censored their political activity.” App. 13a-14a ¶17. But, as Justice Nelson correctly noted in dissent, whether two *individuals*—whose speech rights were not at issue—“have been hindered or censored” is beside the point. App. 62a-63a ¶92. The Montana law quite plainly infringes corporate speech by imposing a ban on corporate independent expenditures—notwithstanding the ability of individuals affiliated with those corporations to speak in other capacities.

*Second*, the decision below ignores this Court’s clear holding that a PAC is not a constitutionally sufficient alternative to corporate independent expenditures. *Citizens United*, 130 S. Ct. at 897. In *Citizens United*, this Court concluded that “Section 441b is a



ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.” *Id.* at 897. As the Court explained, “[a] PAC is a separate association from the corporation” and, in any event, it is a burdensome alternative to direct political speech by the corporation itself. *Id.* The Montana Supreme Court completely disregarded this Court’s analysis of the legal distinctions between a corporation and its PAC, suggesting instead that this Court merely held a PAC was not a sufficient alternative “because of the burdensome, extensive, and expensive Federal regulations that applied.” App. 10a-11a ¶12. The state supreme court then purported to distinguish *Citizens United* on the ground that, “[u]nlike the Federal law PAC considered in *Citizens United*,” political committees in Montana “are easy to establish and easy to use to make independent expenditures for political speech.” App. 32a ¶47; see also App. 16a ¶21 (stating that “under Montana law a political committee can be formed and maintained by filing simple and straight-forward forms or reports”). In relying on these supposed distinctions between federal and Montana law, however, the court lost sight of the essential point: Whatever the administrative requirements, a PAC alternative cannot cure the constitutional defect with a ban on corporate independent expenditures because forming a separate association does not allow the corporation to speak. See *Citizens United*, 130 S. Ct. at 897.

*Third*, the decision below revived the anti-distortion and anti-corruption rationales that this Court in *Citizens United* found unconvincing and insufficient to justify a ban on corporate independent expenditures. In *Citizens United*, this Court analyzed the legal sufficiency of rationales that purportedly supported the constitutionality of restrictions on

corporate independent expenditures before concluding that the government could not defend the ban as a means of curbing the influence of wealth amassed in the economic marketplace or equalizing the relative ability of speakers to influence elections. See *Citizens United*, 130 S. Ct. at 903-04. Yet, in direct contravention of *Citizens United*, the Supreme Court of Montana upheld the State's prohibition on corporate independent expenditures based on Montana's purportedly "clear interest" in "preserving the integrity of its electoral process," "encouraging the full participation of the Montana electorate," and minimizing the "corporate power that can be exerted with unlimited political spending." App. 26a ¶138; App. 22a ¶29.

In relying on those state interests as a basis for silencing corporate political speech, the Montana Supreme Court attempted to recast *Citizens United* as a factbound ruling with little applicability outside the "unique and complex" federal regulatory scheme. App. 10a ¶11; see also App. 12a ¶15 ("*Citizens United* was decided on its facts or lack of facts . . ."); App. 16a ¶21 (the "Court in *Citizens United* emphasized the length, complexity and ambiguity of the Federal restrictions"). That description of *Citizens United* is simply false. This Court's analysis of what the First Amendment means and requires was not limited to the setting of federal elections. See *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 1307 (2012) (statement of Ginsburg, J., respecting the stay) (indicating that court below was bound to follow *Citizens United*, but suggesting it might be revisited). It applies equally in every State, and compels the conclusion that Montana's law prohibiting independent political expenditures by a corporation is unconstitutional.

*Fourth*, the Supreme Court of Montana again ignored this Court's precedent in concluding that the State's ban on corporate independent expenditures is necessary to ensure that elected judges are not biased in favor of campaign supporters. See App. 30a ¶44 ("Litigants appearing before a judge elected after a large expenditure of corporate funds could legitimately question whether their due process rights were adversely impacted."). The court's reasoning disregarded this Court's holding in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), that an elected judge is required to recuse himself "when a person with a personal stake in a particular case ha[s] a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 2263-64. Thus, as this Court recognized in *Citizens United*, recusal—not a ban on political speech—is the appropriate means of protecting a litigant's due process right to a fair trial before an unbiased judge. See 130 S. Ct. at 910.

**B. The Montana Supreme Court's Reliance On History To Uphold The State's Ban On Corporate Expenditures Conflicts With *Northwest Austin*.**

The Montana Supreme Court's decision upholding the State's ban on corporate independent expenditures also rested on the "context of the time and place [the ban] was enacted." App. 17a ¶22. The state supreme court's reliance on Montana's purportedly unique history to sustain the 100-year-old law cannot be reconciled with this Court's decision in *Northwest Austin*, 129 S. Ct. 2504.

In upholding Montana's current ban on corporate independent expenditures, the Montana Supreme Court recited examples of alleged corporate influence in the State during the first half of the twentieth century and concluded that the electorate "clearly had a compelling interest to enact the challenged statute in 1912." App. 25a ¶36. It then questioned:

[W]hen in the last 99 years did Montana lose the power or interest sufficient to support the statute, if it ever did. If the statute has worked to preserve a degree of political and social autonomy is the State required to throw away its protections because the shadowy backers of WTP seek to promote their interests? Does the state have to repeal or invalidate its murder prohibition if the homicide rate declines? We think not.

App. 26a ¶37.

In *Northwest Austin*, however, this Court confirmed that historical data alone are insufficient to justify a statute in the face of constitutional infirmity. Considering Congress's extension of Section 5 of the Voting Rights Act ("VRA"), which "authorizes federal intrusion into sensitive areas of state and local policymaking," the Court emphasized that "[p]ast success alone is not adequate justification to retain the preclearance requirements." 129 S. Ct. at 2511 (internal quotation marks omitted). Although the Court left open whether conditions continued to warrant preclearance under the VRA, it could not have been more clear that the Act's "current burdens . . . must be justified by current needs." *Id.* at 2512.

Thus, even assuming that corporate expenditures had actually corrupted the political process in

Montana in 1912, *Northwest Austin* makes clear that century-old events standing alone cannot justify modern-day burdens on First Amendment rights. If, as the Montana Supreme Court suggests, the State's prohibition on corporate independent expenditures has remedied some of the evils it was designed to prevent, those achievements may in fact have rendered the law obsolete. See *Nw. Austin*, 129 S. Ct. at 2511-12; see also *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (explaining that the Court "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further" an interest in student body diversity in the context of public higher education).

The Montana Supreme Court nevertheless asserted that "[t]he corporate power that can be exerted with unlimited political spending is still a vital interest to the people of Montana," and that Montana remains "especially vulnerable to continued efforts of corporate control" due to "corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs." App. 22a ¶29; App. 26a ¶37. Ultimately, Montana's supposedly "unique and compelling interests" in restricting corporate political speech, App. 26a ¶37, are nothing more than a repackaging of the discredited anti-distortion and anti-corruption rationales that this Court has already expressly rejected as grounds for prohibiting corporate independent expenditures. See *Citizens United*, 130 S. Ct. at 913. If allowed to stand, the Montana Supreme Court's decision would invite a state-by-state roll-back of corporations' First Amendment rights based on unsubstantiated geographic and demographic considerations that have no place in First Amendment analysis.



## **II. SUMMARY REVERSAL IS THE APPROPRIATE RESPONSE TO THE OBVIOUS CONFLICTS BETWEEN THE DECISION BELOW AND THIS COURT'S CONTROLLING PRECEDENT.**

Under appropriate circumstances, this Court may enter an order summarily disposing of a case on the merits. Sup. Ct. R. 16.1. Summary reversal is appropriate where a lower-court decision addressing an issue of national importance is so plainly contrary to this Court's controlling precedent that full briefing and argument are not required to identify the error. See Eugene Grossman et al., *Supreme Court Practice* § 5.12(a) (9th ed. 2007) (a summary reversal order "usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time"). In light of the Montana Supreme Court's refusal to follow this Court's binding, and squarely on point, First Amendment precedent, summary reversal is appropriate in this case.

### **A. Summary Reversal Is Warranted To Correct The Supreme Court Of Montana's Clear Error On An Issue Of National Importance.**

On numerous occasions, this Court has summarily reversed lower-court decisions that directly and plainly conflict with a prior holding of this Court. In *CSX Transportation, Inc. v. Hensley*, 556 U.S. 838 (2009) (per curiam), for example, this Court summarily reversed a decision of the Tennessee Court of Appeals that failed to adhere to the plain import of its recent decision in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), which established the

appropriate standard for recovering damages for fear of cancer under the Federal Employers' Liability Act. See, e.g., *Bobby v. Mitts*, 131 S. Ct. 1762 (2011) (per curiam) (summarily reversing decision that conflicted with *Smith v. Spisak*, 130 S. Ct. 676 (2010)); *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam) (summarily reversing decision that conflicted with *Kimbrough v. United States*, 552 U.S. 85 (2007)); *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam) (summarily reversing decision "to correct a clear misapprehension of the qualified immunity standard"); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (summarily reversing decision that was "flatly contrary" to this Court's controlling Fourth Amendment precedent).

Summary reversal is especially appropriate where a lower court has declined to follow a recent decision of this Court recognizing constitutional rights that had previously been violated on a widespread basis and where that decision has generated significant controversy and opposition. See *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam) (summarily reversing contempt conviction for refusing to comply with segregated seating requirements in courtroom); *Pennsylvania v. Bd. of Dir. of City Trusts of City of Phila.*, 353 U.S. 230 (1957) (per curiam) (summarily reversing decision that the denial of admission to an educational institution on the basis of an applicant's race was consistent with the Fourteenth Amendment); cf. *Trs. of the Monroe Avenue Church of Christ v. Perkins*, 334 U.S. 813 (1948) (per curiam) (summarily reversing judgment upholding validity of racially restrictive covenant).

Summary reversal is warranted in this case because the Montana Supreme Court unquestionably departed from this Court's recent precedent recogniz-

ing the fundamental First Amendment right of individuals to band together in the corporate form to engage in political speech. In order to sustain Montana's prohibition on corporate independent expenditures, the Montana Supreme Court improperly cabined the holding of *Citizens United* to the context of federal election law, minimized the ban's burdens on political speech, and relied on governmental interests expressly considered and rejected by this Court. The Montana Supreme Court's narrow reading of *Citizens United* and watered-down application of strict scrutiny to a ban on corporate independent expenditures would empower States to disregard the First Amendment rights of corporations at will.

In apparent recognition of the magnitude of the Montana Supreme Court's errors, this Court has already issued a stay of the lower court's decision. *Am. Tradition P'ship*, 132 S. Ct. 1307. Summary reversal is now appropriate to correct those manifest errors.

In its opposition to the application for a stay, the State argued that state court decisions passing on the constitutionality of state laws are unsuitable for summary reversal. Montana's Opposition to the Application for a Stay of the Montana Supreme Court's Decision Pending Certiorari, at 9-10 (Feb. 15, 2012). But it is well-settled that a state court's refusal to follow the controlling precedent of this Court is not insulated from summary disposition. See, e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam); *Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam); *Ashland Oil, Inc. v. Tax Comm'r of W. Va.*, 497 U.S. 916 (1990) (per curiam); *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam); *Oregon v. Mathiason*, 429

U.S. 492 (1977) (per curiam); *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam).

This remains the case where a state court upheld the constitutionality of a state statute. In *Turner v. Department of Employment Security of Utah*, 423 U.S. 44 (1975) (per curiam), for example, this Court summarily vacated a decision of the Utah Supreme Court upholding a state statute that made pregnant women ineligible for unemployment benefits for an 18-week period surrounding childbirth. *Id.* at 44. The state supreme court upheld the challenged ineligibility provision in part because it rested on a conclusive presumption that women are "unable to work" during that time. *Id.* at 45. In vacating the decision, this Court held that the presumption of incapacity and unavailability for employment created by the state statute was virtually identical to the presumption that had already been found unconstitutional in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). *Turner*, 423 U.S. at 46; cf. *Rose v. Ark. State Police*, 479 U.S. 1 (1986) (per curiam) (summarily reversing a state court decision upholding a state statute that conflicted with a federal statute).

State courts—like federal courts—have an unwavering obligation to uphold the Constitution of the United States and follow this Court's decisions until they are withdrawn or modified. See U.S. Const. art. VI, cl. 2. They are not freed from that constitutional obligation where the decision of this Court is controversial or unpopular, where it was rendered by a divided Court, or where state officials disagree with the decision as a matter of policy. See *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). In constitutional matters, "[i]t is emphatically the province" of this

Court—not the political branches, lower courts, or state officials—“to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); App. 40a ¶60 (Baker, J., dissenting) (“Americans today accept the [United States Supreme] Court’s role as guardian of the law. They understand the value to the nation of following Court decisions, . . . even when they disagree with a Court decision and even when they may be right and the decisions may be wrong.”) (quoting Stephen Breyer, *Making Our Democracy Work: A Judge’s View* 214 (2010)).

**B. The Question Whether Current Corporate Expenditures Warrant Reconsideration Of *Citizens United* Is Not Presented.**

When this Court granted a stay of the Montana Supreme Court’s decision, Justice Ginsburg, joined by Justice Breyer, wrote that “Montana’s experience, and experience elsewhere since this Court’s decision in *Citizens United* make it exceedingly difficult to maintain that independent expenditures by corporations do not give rise to corruption or the appearance of corruption.” *Am. Tradition P’ship*, 132 S. Ct. at 1307-08 (citation and internal quotation marks omitted). “A petition for writ of certiorari,” they suggested, would “give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates’ allegiance, *Citizens United* should continue to hold sway.” *Id.* at 1308.

Respectfully, that question is not presented here. The Montana Supreme Court did not uphold its State’s prohibition on corporate independent expenditures on the basis of the purportedly “huge sums” that corporations have spent exercising their fundamental First Amendment freedoms since *Citizens*



*United* was decided. Instead, the lower court purported to decide the case based on Montana's supposedly unique history, geography, politics, and economy. See App. 13a ¶16. The Montana Supreme Court's state-specific analysis makes this case an exceedingly poor vehicle to reexamine the broader constitutional questions settled in *Citizens United*.

\* \* \*

The decision below is a transparent attempt to circumvent the application of this Court's precedent to a state statute that is materially indistinguishable from the federal prohibition on corporate independent expenditures struck down by this Court in *Citizens United*. Such constitutional mischief should proceed no further. The Court should reaffirm its position as the final arbiter of the Constitution's meaning by granting review and summarily reversing the decision of the Supreme Court of Montana.

# CONCLUSION

This Court should grant the petition for a writ of certiorari and summarily reverse the decision of the Supreme Court of Montana.

Respectfully submitted.

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April 27, 2012

**AMICUS  
CURIAE  
BRIEF**

IN THE  
**Supreme Court of the United States**

AMERICAN TRADITION PARTNERSHIP, INC., ET AL.,

*Petitioners,*

—V.—

STEVE BULLOCK, ATTORNEY GENERAL OF MONTANA, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF MONTANA

**BRIEF AMICI CURIAE OF FORMER OFFICIALS  
OF THE AMERICAN CIVIL LIBERTIES UNION  
IN SUPPORT OF NEITHER PARTY**

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April 27, 2012

## QUESTION PRESENTED

Should a writ of certiorari issue to the Montana Supreme Court enabling this Court to consider the application of the Montana statute at issue to electoral spending by multi-shareholder business corporations?



## TABLE OF CONTENTS

QUESTION PRESENTED .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
INTEREST OF <i>AMICI</i> .....	2
STATEMENT OF THE CASE .....	5
REASONS FOR GRANTING THE WRIT .....	6
Defining the Scope of First Amendment Electoral Rights, if any, Enjoyed by Multi-Shareholder Business Corporations in Federal, State and Local Elections is an Important Unresolved Issue Meriting Plenary Consideration .....	6
A. As a Matter of Corporate Theory Embedded in 150 years of Precedent, Multi-Shareholder Business Corporations Should Not Enjoy a Centralized "Corporate" Free Speech Right to Expend Unlimited Funds to Affect the Outcome of an Election .....	8
B. <i>Bluman v. FEC</i> Calls Into Question the Court's Principal Rationale for Granting First Amendment Electoral Spending Rights to Multi-Shareholder Corporations .....	12

C.	The Unanticipated Impact of <i>Citizens United</i> on Campaign Financing Calls for Reconsideration of This Court's Assumption That Independent Expenditures Cannot Pose a Risk of Actual or Perceived Corruption .....	16
D.	The Unanticipated Impact of <i>Citizens United</i> on Public Disclosure Warrants Plenary Review .....	21
	CONCLUSION .....	23

## TABLE OF AUTHORITIES

## Cases:

<i>Adkins v. Children's Hosp.</i> , 261 U.S. 525 (1923) .....	20
<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997) .....	12
<i>Am. Tradition P'ship, Inc. v. Bullock</i> , 132 S. Ct. 1307, 1307–08 (2012) (Ginsburg & Breyer, JJ., concurring) .....	19
<i>Bluman v. FEC</i> , 132 S. Ct. 1087 (2012) .....	<i>passim</i>
<i>Bluman v. FEC</i> , 800 F. Supp.2d 281 (D.D.C. 2011) .....	15
<i>Braswell v. United States</i> , 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting) .....	<i>passim</i>
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954) .....	20
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	16
<i>California Bankers Association v. Shultz</i> , 416 U.S. 21 (1974) .....	11
<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009) .....	<i>passim</i>
<i>Carey v. Population Serv., Int'l.</i> , 431 U.S. 678 (1977) .....	10

<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010) .....	<i>passim</i>
<i>Colonnade Catering Corp. v. United States</i> , 397 U.S. 72 (1970) .....	11
<i>Cohens v. Virginia</i> , 19 U.S. 264 (1821) .....	4
<i>Crawford v. Marion County Election Board</i> , 553 U.S. 181 (2008) .....	22
<i>44 Liquormart, Inc v. Rhode Island</i> , 517 U.S. 484 (1996) .....	10
<i>FEC v. Mass. Citizens for Life, Inc.</i> , 479 U.S. 238 (1986) .....	3, 11
<i>First Nat'l Bank of Bos. v. Bellotti</i> , 435 U.S. 765 (1978) .....	14
<i>Hale v. Henkel</i> , 201 U.S. 43 (1906) .....	<i>passim</i>
<i>Hunt v. Washington State Apple Adver. Comm'n</i> , 432 U.S. 333 (1977) .....	10
<i>Linmark, Assoc. v. Willingboro</i> , 431 U.S. 85 (1977) .....	10
<i>Louisville, Cincinnati, &amp; Charleston Railroad</i> <i>v. Letson</i> , 43 U.S. (2 How.) 497 (1844) .....	9
<i>Marshall v. Baltimore &amp; Ohio Railroad</i> , 57 U.S. (16 How.) 314 (1853) .....	9
<i>Minersville Sch. Dist. v. Gobitis</i> , 310 U.S. 586 (1940) .....	20

<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964) .....	10
<i>New York Times v. United States</i> , 403 U.S. 713 (1971) .....	10
<i>Ortiz v. Fiberboard Corp.</i> , 527 U.S. 815 (1999) .....	12
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896) .....	20
<i>Railroad Commission Cases</i> , 116 U.S. 307 (1886) .....	9
<i>Santa Clara County v. South Pacific Railroad</i> , 118 U.S. 394 (1886) .....	7, 9
<i>Sierra Club v. Morton</i> , 405 U.S. 727, 749 (Douglas, J. dissenting) (1972) .....	14
<i>Smyth v. Ames</i> , 169 U.S. 466 (1898) .....	9
<i>United States v. Biswell</i> , 406 U.S. 311 (1972) .....	11
<i>United States vs. White</i> , 322 U.S. 694 (1944) .....	13
<i>Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council</i> , 425 U.S. 748 (1976) .....	10
<i>W. Coast Hotel Co. v. Parrish</i> , 300 U.S. 379 (1937) .....	20
<i>Western Tradition P'ship. v. Atty. Gen.</i> , 271 P.3d 1 (Mont. 2011) .....	5, 16



<i>Western Union Telephone Company v. Kansas</i> , 216 U.S. 1 (1910) .....	9
--	---

<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943) .....	20
--	----

### Articles:

John Dewey, <i>The Historic Background of Corporate Legal Personality</i> , 35 Yale L.J. 655 (1926) .....	9
---	---

Frank H. Easterbrook and Daniel R. Fischel, <i>The Corporate Contract</i> , 89 Colum. L. Rev. 1416 (1989) .....	9
---	---

Morton J. Horwitz, <i>Santa Clara Revisited: The Development of Corporate Theory</i> , 88 W. Va. L. Rev. 173 (1985) .....	9
---	---

### Other Materials:

<i>2012 Committee Summary</i> , FEDERAL ELECTION COMMISSION, <a href="http://www.fec.gov/data/CommitteeSummary.do?format=html&amp;election_yr=2012">http://www.fec.gov/data/CommitteeSummary.do?format=html&amp;election_yr=2012</a> (last visited April 15, 2012) .....	19
--	----

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---	----

<i>Failure to Identify Company Owners Impedes Law Enforcement: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Sec. &amp; Gov't Affairs, 109th Cong. (2006)</i> .....	21
<i>Obama Campaign Blurs the Line With Super PAC, CBS News (Apr. 15, 2012, 9:50 PM), <a href="http://www.cbsnews.com/8301-503544_162-57372723-503544/obama-campaign-blurs-the-line-with-super-pac/">http://www.cbsnews.com/8301-503544_ 162-57372723-503544/obama-campaign- blurs-the-line-with-super-pac/</a></i> .....	18
<i>T.W. Farnam, Mystery Donor Gives \$10 Million for Attack Ads, Wash. Post, Apr. 14, 2012, at A6</i> .....	22
<i>U.S. Gov't Accountability Office, GAO-06-376, Company Formations: Minimal Ownership Information Is Collected and Available 46-50 (2006)</i> .....	21
<i>W.B. Yeats, Among School Children (1928)</i> .....	14
<i>Who's Financing the 'Super PACs', NY Times (Apr. 7, 2012, 12:26 PM), <a href="http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html">http://www.nytimes.com/interactive/ 2012/01/31/us/politics/super-pac- donors.html</a></i> .....	19

No. 11-1179

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IN THE  
Supreme Court of the United States

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AMERICAN TRADITION  
PARTNERSHIP, INC., *et al.*,

*Petitioners*

v.

STEVE BULLOCK,  
ATTORNEY GENERAL OF MONTANA, *et al.*,

*Respondents*

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On Petition for a Writ of *Certiorari*  
to the Supreme Court of Montana

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**Brief *Amici Curiae* of Former Officials  
of the American Civil Liberties Union  
in Support of Neither Party<sup>1</sup>**

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<sup>1</sup> *Amici* support petitioners' application for certiorari, oppose petitioners' application for summary reversal, and oppose respondent's anticipated request for denial of certiorari.

### Interest of *Amici Curiae*<sup>2</sup>

*Amici* are former officials of the American Civil Liberties Union (ACLU) who have devoted much of their professional lives to the defense of the First Amendment and the advancement of American democracy. Norman Dorsen is the Frederick I. and Grace A. Stokes Professor of Law and co-director of the Arthur Garfield Hays Civil Liberties Program at New York University Law School. He served as General Counsel of the ACLU from 1969-76, and as President of the ACLU from 1976-91. Aryeh Neier is President of the Open Society Foundations. He served as ACLU Executive Director from 1970-78, and as Executive Director of Human Rights Watch from 1978-90. Burt Neuborne is the Inez Milholland Professor of Civil Liberties at New York University Law School. He served as ACLU Legal Director from 1981-86, and as a member of the New York City Human Rights Commission from 1988-92. John Shattuck is the President and Rector of Central European University in Budapest. He served as ACLU Legislative Director from 1976-84, as Assistant Secretary of State for Democracy, Human Rights and Labor from 1993-98, and as Ambassador to the Czech Republic from 1998-2000. Morton H. Halperin is Senior Advisor to the Open Society Institute. He

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<sup>2</sup> Petitioners' written consent to the filing of this brief has been lodged with the Court. Respondent has filed a blanket consent to the filing of briefs *amici curiae* herein. Notice of intent to submit this brief was provided to both parties in accordance with Supreme Court Rule 37 §2(a). No party has provided financial support or otherwise participated in the preparation or filing of this brief.

served from 1984-92 as ACLU Legislative Director, and as Director of Policy Planning at the State Department under President Clinton.

*Amici* respectfully submit this brief, prepared with the valuable assistance of members of the 2012 Seminar on the United States Supreme Court at New York University Law School,<sup>3</sup> urging the Court to issue a writ of certiorari in this case to permit plenary consideration of whether multi-shareholder business corporations enjoy First Amendment rights to expend unlimited funds in connection with federal, state and local elections.

*Dicta* in the majority opinion in *Citizens United v. FEC*, 130 S. Ct. 876, 911, 919 (2010), appears to grant identically broad First Amendment electoral spending rights to every category of corporate entity, regardless of structure, purpose, size and composition. The only form of corporate entity actually before the Court in *Citizens United* was, however, a non-profit “grassroots” entity that had already been found to enjoy First Amendment electoral spending protection in *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*). The *Citizens United* majority elected, nevertheless, to opine on the electoral spending rights of other types of corporations, including multi-shareholder business corporations, because the majority assumed that all corporate entities (ranging from grassroots ideological non-profits, to single-shareholder corporations, to multi-national,

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<sup>3</sup> The brief does not purport to convey the position of New York University Law School.



multi-shareholder behemoths) inherently enjoy the same electoral spending rights. 130 S. Ct. at 899–900; *id.* at 918, 921–22 (Roberts, C.J., concurring, joined by Alito, J.).

With respect, such an assumption is subject to serious question, especially as applied to multi-shareholder business corporations. Massive legal and factual differences exist between and among ideological grassroots non-profits, single-shareholder businesses, and multi-shareholder business corporations that call for separate analyses of the constitutional rights of each corporate category. *Braswell v. United States*, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting, joined by Brennan, Marshall, & Scalia, JJ.) (distinguishing between single-shareholder and multi-shareholder corporations for purposes of Fifth Amendment self-incrimination analysis).

*Amici* believe that respect for the disciplined case-specific decision-making power of this Court, dating from Chief Justice Marshall's instructions in *Cohens v. Virginia*, 19 U.S. 264, 399 (1821), requires an opportunity for plenary consideration of the electoral spending rights of multi-shareholder business corporations prior to judicial promulgation of a First Amendment rule of law embedding those rights in constitutional cement.<sup>1</sup>

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<sup>1</sup> Chief Justice Marshall stated in *Cohens* that “[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.” 19 U.S. at 399.

## Statement of the Case

Like the petitioner in *Citizens United*, the three petitioners in this case—two grassroots non-profit corporations and a small single-shareholder business corporation—seek to establish constitutional protection for unlimited electoral spending by multi-shareholder business corporations without confronting the legal and factual issues posed by introducing such a dramatically different category of corporation into the First Amendment mix. In the lower courts, petitioners sought facial invalidation of Montana's century-old statutory ban on corporate electoral expenditures. The Montana Supreme Court upheld the statute on its face (thereby preserving its application to out-of-state multi-shareholder business corporations), while leaving petitioners free to seek narrower judicial relief limited to grassroots non-profit corporations and single-shareholder family corporations. *Western Tradition P'ship. v. Atty. Gen.*, 271 P.3d 1 (Mont. 2011).

In this Court, petitioners' application for summary reversal continues to seek facial invalidation of the challenged statute—an outcome that would subject Montana's statewide and local elections to unlimited spending by out-of-state multi-shareholder business corporations—without plenary consideration by any court of the unresolved legal and factual issues raised by such a consequential event.

If, despite the best efforts of its legislature, Montana's statewide and local elections are to be exposed, once again, to the risk of a barrage of corporate funds similar to barrages that have led,

in the past, to corrupt domination of Montana's government by out-of-state mining interests, surely it should be after full judicial consideration of the unresolved legal and factual issues posed by such a dramatic intrusion into Montana's democratic processes.

### **Reasons for Granting the Writ**

#### **Defining the Scope of First Amendment Electoral Spending Rights, if any, Enjoyed by Multi-Shareholder Business Corporations in Federal, State and Local Elections is an Important Unresolved Issue Meriting Plenary Consideration**

In *Citizens United*, confronted with multiple First Amendment reasons why a grassroots non-profit corporation was constitutionally entitled to distribute an electoral video to willing recipients in the context of a Presidential election, this Court invalidated the federal prohibition on its face. Since the majority assumed that all corporations, no matter how structured, must inherently enjoy identical First Amendment spending rights in all elections, the *Citizens United* Court did not consider whether the unique structural and legal aspects of multi-shareholder business corporations require a separate constitutional analysis. A grant of certiorari is necessary to permit consideration of four unresolved issues.

First, recognition by this Court of a multi-shareholder business corporation's right to spend unlimited sums to affect the outcome of an election would constitute a break with 150 years of precedent. Until now, this Court has recognized a

corporate constitutional right only to facilitate the enjoyment of commonly-shared rights and interests belonging to the natural persons who constitute the corporate enterprise. Where, as here, intra-corporate conflicts of interest exist between and among those natural persons concerning the exercise of a given constitutional right, the Court has declined to recognize a unitary corporate right. Compare *Santa Clara County v. South Pacific Railroad*, 118 U.S. 394 (1886) (recognizing a corporate right to equal protection of the laws), with *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906) (declining to recognize a corporate Fifth Amendment right against self-incrimination). See also *Braswell v. United States*, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting) (agreeing with refusal to recognize self-incrimination rights for large corporations, but urging recognition of self-incrimination rights in context of single-shareholder corporation). See *infra* at pp. 8-12.

Second, this Court's unanimous summary affirmance in *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (upholding the federal government's right to bar lawful resident aliens from making independent expenditures in connection with federal elections) is in conflict with the Court's *dicta* in *Citizens United* explaining that multi-shareholder business corporations enjoy unlimited electoral spending rights regardless of whether they qualify as protected speakers based solely on the useful nature of their speech. *Bluman's* concentration on the identity of the speaker, as opposed to the alleged usefulness of the speech, seriously undermines the Court's only rationale for granting First Amendment protection to unlimited

electoral spending by multi-shareholder business corporations. See *infra* at pp. 12-16.

Third, the unanticipated post-*Citizens United* emergence of candidate-specific “Super PACs,” staffed by close associates of particular candidates and capable of receiving donations of unlimited size from corporations and individuals, has eroded any meaningful distinction between campaign contributions and independent expenditures. From the perspective of the risk of actual or apparent *quid pro quo* corruption, no difference exists between a contribution to a candidate’s campaign and an independent expenditure paid to a candidate-specific Super PAC staffed by a candidate’s close associates. See *infra* at pp. 16-20.

Fourth, the post-*Citizens United* ability of business corporations to engage in unlimited electoral spending renders it impossible to enforce “effective” disclosure rules that are a *sine qua non* of unlimited electoral spending rights. See *infra* at pp. 21-22.

#### A.

### **As a Matter of Corporate Theory Embedded in 150 years of Precedent, Multi-Shareholder Business Corporations Should Not Enjoy a Centralized “Corporate” Free Speech Right to Expend Unlimited Funds to Affect the Outcome of an Election**

For more than 150 years, corporations, viewed as “persons” under the Fourteenth Amendment or as “citizens” under Article III, have often been said by this Court to possess “corporate” constitutional rights—but not because a fictive legal



abstraction like a corporation is capable of enjoying constitutional rights in the same manner as a natural person. To the contrary, this Court has invoked the concept of a centrally-enforceable "corporate" constitutional right as a pragmatic device to protect the commonly-shared rights and interests of the decentralized natural persons who constitute the corporation, and who would experience difficulty enforcing their rights individually. Frank H. Easterbrook and Daniel R. Fischel, *The Corporate Contract*, 89 Colum. L. Rev. 1416 (1989); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173 (1985). See generally John Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L.J. 655 (1926).

In each of the nineteenth and early-twentieth-century cases recognizing a corporate constitutional right, the Court acted to facilitate effective centralized enforcement of commonly shared rights and interests belonging to the corporation's human constituents. See, e.g., *Louisville, Cincinnati, & Charleston Railroad v. Letson*, 43 U.S. (2 How.) 497 (1844); (access to federal court); *Marshall v. Baltimore & Ohio Railroad*, 57 U.S. (16 How.) 314 (1853) (same); *Western Union Telephone Company v. Kansas*, 216 U.S. 1 (1910) (right to do business throughout the United States); *Santa Clara County v. South Pacific Railroad*, 118 U.S. 394 (1886) (right to equal treatment by regulatory laws); *Railroad Commission Cases*, 116 U.S. 307 (1886) (rights against unlawful taking of investment property); *Smyth v. Ames*, 169 U.S. 466 (1898) (rights against deprivation of investment property

without due process of law); *Hale v. Henkel*, 201 U.S. 43 (1906) (Fourth Amendment privacy rights affecting investment property).<sup>5</sup>

The Court's commercial speech, free press, and non-profit corporation First Amendment decisions similarly facilitate the centralized enforcement of speech rights held in common by a corporation's decentralized human constituents. For example, the commercial speech cases protect the commonly-shared interest of each corporate participant in assuring that accurate information about the corporate product is widely disseminated. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (prescription drug price advertising); *Linmark, Assoc. v. Willingboro*, 431 U.S. 85, 96-97 (1977) (For Sale signs on residential property); *Carey v. Population Serv., Int'l.*, 431 U.S. 678, 700-01 (1977) (commercial information concerning contraceptives); and *44 Liquormart, Inc v. Rhode Island*, 517 U.S. 484, 501 (1996) (liquor price advertising).

The numerous corporate free press cases such as *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *New York Times v. United States*, 403 U.S. 713 (1971) protect and reinforce the commonly-shared rights and interests of each participant a corporate

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<sup>5</sup> The doctrine of associational standing similarly generates a centralized enforcement agent for rights held by participants in unincorporated and certain non-profit corporate settings. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). In the corporate area, the shareholders' derivative action enables centralized enforcement of shareholders' rights against corporate management, while corporate constitutional rights enable the shareholders to enforce their shared rights effectively against the government.

press enterprise in preventing the government from dictating the content of the press enterprise's product, and restricting when, where and to whom the product may be sold.

Finally, the non-profit corporation cases such as *Citizens United* and *MCFL* protect the commonly-shared rights and interests of individuals who have joined together in non-profit corporate form to advance certain values in maximizing their collective ability to communicate in aid of those values.

Where, however, the individual constituents of a corporate community do not share common interests in connection with the exercise of a given constitutional right, this Court has rejected the idea of a unitary "corporate" constitutional right. For example, in a long line of cases beginning with *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906), this Court declined to recognize a corporate Fifth Amendment right against self-incrimination, thereby denying corporate management the unilateral power to keep information concerning possible criminal behavior from the wider corporate community. See also *California Bankers Association v. Shultz*, 416 U.S. 21 (1974) (no exemption from bank reporting requirements); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (limited Fourth Amendment protection for multi-shareholder corporations in the alcohol industry); *United States v. Biswell*, 406 U.S. 311, 314-15 (1972) (limited Fourth Amendment protection for multi-shareholder corporations in the firearms industry).

If this Court remains true to its precedents, it should follow *Hale v. Henkel* and Justice Kennedy's

dissent in *Braswell v. United States*, 487 U.S. 99, 119 (1988) by declining to vest multi-shareholder business corporations with a unitary, centrally-enforceable First Amendment electoral spending right. As in the Fifth Amendment self-incrimination setting, serious intra-corporate conflicts over the exercise of such a First Amendment right are a virtual certainty.<sup>6</sup> Given the virtual certainty of intra-corporate conflicts over whether to engage in electoral spending and, if so, which candidates to support or oppose, the Court's precedents which recognize a "corporate" constitutional right only when it enables centralized enforcement of the commonly-shared rights and interests of the individual corporate participants, argue strongly against recognizing a unitary multi-shareholder corporate electoral spending right.

At a minimum, the issue warrants plenary consideration.

## B.

### ***Bluman v. FEC* Calls Into Question the Court's Principal Rationale for Granting First Amendment Electoral Spending Rights to Multi-Shareholder Corporations**

In his dissent in *Braswell*,<sup>7</sup> Justice Kennedy agreed that multi-shareholder corporations are not

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<sup>6</sup> The Court has demonstrated a similar reluctance to license a centralized enforcement agent in class action settings where conflicts exist between and among segments of a proposed class. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997); *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 864-65 (1999).

<sup>7</sup> In *Braswell*, Justice Kennedy, joined by Justices Brennan, Marshall and Scalia, argued unsuccessfully, that, unlike a

sufficiently engaged in "the realm of human thought and expression" to warrant Fifth Amendment protection against self-incrimination. 487 U.S. at 119 ("[The Fifth Amendment] is an explicit right of a natural person, protecting the realm of human thought and expression[.]") (Kennedy, J., dissenting); see also *United States vs. White*, 322 U.S. 694, 698-701 (1944).

In *Citizens United*, however, Justice Kennedy, writing for the majority, upheld a corporation's First Amendment right to spend unlimited corporate funds to affect the outcome of an election. See 130 S. Ct. at 900.

Although the two opinions may appear inconsistent, each, viewed on its facts, is faithful to this Court's historic practice of recognizing a corporate constitutional right to protect the commonly-shared rights and interests of individual corporate constituents—the sole-shareholder in *Braswell*; and the individual members of the ideological non-profit entity in *Citizens United*.

It was, however, impossible for Justice Kennedy in *Citizens United* to defend a multi-shareholder corporate right of unlimited electoral spending as a traditional device to protect the commonly-shared interests of the corporations' individual participants. Instead, he reasoned that unlimited multi-shareholder corporate electoral spending is entitled to First Amendment protection because it generates speech that

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multi-shareholder corporation, a single-shareholder entity should enjoy Fifth Amendment self incrimination rights as the *alter ego* of the sole-shareholder. 487 U.S. at 119-130 (Kennedy, J., dissenting).



is useful to citizens, without regard to whether the multi-shareholder corporation would itself qualify as a protected speaker. *Id.* at 898-99, 916. In short, when multi-shareholder corporate electoral spending was concerned, Justice Kennedy, like W.B. Yeats, declined to separate the speaker from the speech.<sup>8</sup>

The Court's reluctance to separate corporate speakers from corporate speech is the principal—indeed, the only—legal rationale in *Citizens United* for extending electoral spending protection to multi-shareholder business corporations. *Id.* at 899 (“The First Amendment protects speech and speaker, and the ideas that flow from each.”). It was also the only rationale put forth in *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978) (upholding spending of bank’s corporate funds in opposition to referendum on taxation). See *Sierra Club v. Morton*, 405 U.S. 727, 749 (Douglas, J. dissenting) (1972) (arguing that the environment itself should be viewed as a judicially-protected value that exists independently of the litigants).

This Court’s unanimous rejection of the First Amendment claim in *Bluman v. FEC*, 132 S. Ct. 1087 (2012), cannot, however, be harmonized with the rationale of *Citizens United* and *Bellotti*. In *Bluman*, two lawful resident aliens, a Canadian graduate of an American law school working for a Wall Street law firm, and an Israeli medical resident at Mt. Sinai Hospital, challenged the

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<sup>8</sup> O body swayed to music, O brightening glance,  
How can we know the dancer from the dance?  
W.B. Yeats, *Among School Children* (1928)

statutory ban on independent electoral spending in federal elections by lawful resident aliens.

This Court unanimously summarily affirmed a three-judge court decision rejecting the resident aliens' First Amendment claim. 132 S. Ct. 1087 (2012), summarily affirming 800 F. Supp.2d 281 (D.D.C. 2011). Since the proposed electoral spending in *Bluman* was functionally indistinguishable from the electoral spending before the Court in *Citizens United*, the Court's decision to protect multi-shareholder corporate speakers in *Citizens United*, but to decline to protect lawful resident aliens in *Bluman*, cannot rest on differences in the content of their speech. If a principled distinction exists, it must rest on differences between the two categories of speakers. If, however, after *Bluman*, the identity of the speaker (and not merely the usefulness of the speech) is an important factor in deciding whether electoral spending is protected by the First Amendment, the Court's reasoning in *Citizens United* justifying unlimited spending by multi-shareholder business corporations has been seriously eroded.

Given the importance of the issue, this Court should grant plenary review to consider whether multi-shareholder business corporations, lacking attributes of conscience and human dignity, are, nevertheless, protected electoral speakers based solely on the allegedly useful nature of their speech.

Moreover, since *Bluman* necessarily recognizes a compelling national governmental interest in preventing lawful resident aliens from

spending money to influence federal elections, surely Montana may protect its statewide and local elections from the prospect of massive electoral expenditures by the very out-of-state mining corporations that once corruptly dominated Montana's political life.<sup>9</sup>

C.

**The Unanticipated Impact of *Citizens United* on Campaign Financing Calls for Reconsideration of This Court's Assumption That Independent Expenditures Cannot Pose a Risk of Actual or Perceived Corruption**

*Buckley v. Valeo*, 424 U.S. 1 (1976) held that while contributions made directly to a candidate may be regulated as to size and source because they present a risk of actual or apparent *quid pro quo* corruption, independent electoral expenditures, occurring without coordination between donor and candidate, are incapable of raising even the appearance of such a risk. *Id.* at 47. ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate). The *Citizens United* majority reiterated the bright-line

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<sup>9</sup> The history of Montana's efforts to shield its democracy from domination by out-of-state mining interests is set forth at *Western Tradition P'ship, Inc. v. Atty. Gen.*, 271 P.3d 1, 8-9 (Mont. 2011).

distinction between contributions and independent expenditures. 130 S. Ct. at 883.

Facts that have become apparent since *Citizens United* have, however, seriously undermined the validity of such a bright-line distinction. When unlimited corporate electoral spending (made possible by *Citizens United*) was added to unlimited individual electoral spending (permissible under *Buckley*), the combination triggered the emergence of candidate-specific political entities—informally dubbed “Super PACs”—formally unconnected to a candidates’ campaign, but often headed by the favored candidate’s close political and personal associates. Since Super PACs are formally independent from a candidate’s campaign, they accept financial support in unlimited amounts from corporations and wealthy individuals characterized as independent expenditures.

The emergence of candidate-specific entities, staffed by persons enjoying close ties to the candidate with the ability to accept unlimited sums from corporations and individuals, set off a campaign-finance feeding-frenzy that has eroded—and perhaps destroyed—the Court’s attempt to distinguish between contributions and independent expenditures.

In the post-*Citizens United* world, no meaningful distinction exists concerning risk of actual or apparent *quid pro quo* corruption between contributions to a candidate and unlimited independent expenditures made to Super PACs staffed by a candidate’s close associates. Given the intimate ties that exist between individuals at the helm of many Super PACs and their

preferred candidates,<sup>10</sup> the public cannot help but perceive a risk that massive payments to Super PACs may be accompanied by *quid pro quo* promises made on behalf of the candidate by a close associate with actual or apparent authority to make them.

Even before the post-*Citizens United* collapse of the distinction between campaign contributions and independent expenditures, the Court's assertion that independent expenditures are inherently incapable of generating an appearance of *quid pro quo* corruption had been called into serious question by *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In *Caperton*, the Court ruled that a multi-million dollar independent expenditure in support of a judge facing an election created an unacceptable risk of actual or apparent post-election judicial favoritism,

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<sup>10</sup> See, e.g., Bill Burton and Sean Sweeney, former aides to President Obama, who founded and direct the pro-Obama "Priorities USA Action"; Carl Forti, former political director for Governor Romney, who founded and directs the pro-Romney "Restore Our Future"; Rick Tyler, former aide to Speaker Gingrich, who founded and directs the pro-Gingrich Super PAC "Winning Our Future"; Mike Toomney, former Chief of Staff to Governor Perry, who directed the pro-Perry Super PAC "Make Us Great Again." See *Obama Campaign Blurs the Line With Super PAC*, CBS News (Apr. 15, 2012, 9:50 PM), [http://www.cbsnews.com/8301-503544\\_162-57372723-503544/obama-campaign-blurs-the-line-with-super-pac/](http://www.cbsnews.com/8301-503544_162-57372723-503544/obama-campaign-blurs-the-line-with-super-pac/). Perhaps the closest relationship between a candidate and a Super PAC was achieved by Ambassador Jon Huntsman, whose father both headed the entity and contributed \$2.2 million of the \$3.2 million the Super PAC raised. *Committee Summary Reports—2011–2012 Cycle: Our Destiny PAC*, Fed. Election Comm'n (Feb. 29, 2012), <http://query.nictusa.com/cgi-bin/cancomsrs/?12+C00501098>.



requiring the judge's recusal in cases involving the independent supporter.

Justice Kennedy, writing for the *Caperton* majority, found that \$3 million in independent election expenditures, including a \$2.5 million donation to a formally-independent entity pledged to support the judicial candidate, was "extraordinary." 556 U.S. at 884. Justice Kennedy's characterization of an "extraordinary" independent expenditure of \$3 million in 2009 pales in comparison with the more than \$169 million in contributions to Super PACs reported, thus far, in the 2012 election cycle, including at least 30 seven-figure donations to candidate-specific Super PACs headed by close associates of the candidate.<sup>11</sup> As Justices Ginsburg and Breyer have noted, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 1307, 1307–08 (2012), the emergence of a culture of multi-million dollar payments by corporations and wealthy individuals to political entities like Super PACs staffed by persons with close ties to the candidate, has already generated a significant appearance of *quid pro quo* corruption.

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<sup>11</sup> See 2012 Committee Summary, FEDERAL ELECTION COMMISSION, [http://www.fec.gov/data/CommitteeSummary.do?format=html&election\\_yr=2012](http://www.fec.gov/data/CommitteeSummary.do?format=html&election_yr=2012) (last visited April 15, 2012) (total contributions of \$169 million from all sources to independent-expenditure only committees (Super PACs)). See also, *Who's Financing the 'Super PACs'*, NY Times (Apr. 7, 2012, 12:26 PM), <http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html>, reporting at least 30 contributions of \$1 million or more to Super PACs, including the following that exceed the sums in *Caperton*: Harold Simmons (\$10 million); Sheldon Adelson (\$7.5 million); Miriam Adelson (\$7.5 million); and Bob Perry (\$4.0 million).

It is no answer to argue that *Caperton* involved recusal, not the imposition of limits on independent spending. The teaching of *Caperton* is that massive pre-election independent spending can present an unacceptable risk of post-election corruption, especially in light of the massive payments to candidate-specific Super PACs in the wake of *Citizens United*. Where recusal is possible, it provides one form of remedy. Where, however, recusal is not a practical option—as in most executive or legislative settings—American democracy should not be rendered powerless to defend itself.

Plenary review is needed to consider whether the changed factual reality in the wake of *Citizens United* calls for a re-examination of the Court's assumption that independent expenditures are not capable of generating a risk of actual or perceived *quid pro quo* corruption.<sup>12</sup>

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<sup>12</sup> The Court has altered constitutional doctrine when the Court's initial understanding of the doctrine's factual underpinnings no longer appeared to be accurate. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (recognizing both overestimation of state interest, and underestimation of factual impact of ruling in *Gobitis* on Jehovah's Witnesses); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) (recognizing underestimation of factual impact of legally-mandated segregation on minority race); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (recognizing factual need for minimum wage legislation).

## D.

**The Unanticipated Impact of  
*Citizens United* on Public Disclosure  
Warrants Plenary Review**

This Court has repeatedly recognized the importance of effective disclosure to the proper functioning of any campaign finance system that permits unlimited spending. *Citizens*, 130 S. Ct. at 916. *Citizens United* opens two huge loopholes that render it all but impossible to maintain an effective system of disclosure.

After *Citizens United*, corporate or individual donors may shield their identities by the simple expedient of funneling election spending through shell corporations that fail to reveal their principals. No matter how stringent the rules may be requiring public disclosure of corporate principals, it is often impossible to identify the human beings behind a corporate screen. Witness the difficulty in identifying and prosecuting certain categories of tax fraud.<sup>13</sup> If the IRS has difficulty penetrating corporate smokescreens, the FEC doesn't have a chance.

Similarly,<sup>1</sup> foreign nationals, barred after *Bluman* from spending money to influence a federal election, may now funnel their spending through shell American corporations, foreign-

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<sup>13</sup> U.S. Gov't Accountability Office, GAO-06-376, *Company Formations: Minimal Ownership Information Is Collected and Available* 46-50 (2006); *Failure to Identify Company Owners Impedes Law Enforcement: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Gov't Affairs*, 109th Cong. (2006).

controlled American corporations, or American subsidiaries of foreign corporations. The potential for evasion is virtually boundless

Since both *Buckley* and *Citizens United* rest on an assumption that “effective” public disclosure will mitigate the risk of corruption inherent in a regime of unlimited electoral spending, and since loopholes created and exacerbated by *Citizens United* render such “effective” disclosure impossible, this Court should re-examine whether unlimited independent expenditures pose a sufficient of risk of electoral fraud to warrant a prophylactic Congressional response.<sup>14</sup> If speculative concern over potential election fraud justified the imposition of prophylactic voter identification requirements that operate with particular severity against low-income voters, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the far more plausible fear of election fraud created by secret, untraceable corporate payments of unlimited size to candidate-specific Super PACs staffed by close associates of the candidate should also justify a prophylactic ban on untraceable corporate electoral spending.

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<sup>14</sup> For example, tax returns recently filed by Crossroads GPS, a Super PAC committed to the defeat of President Obama, reveal one donation of \$10 million from an untraceable source, together with at least 26 seven-figure contributions, most of which were anonymous. See T.W. Farnam, *Mystery Donor Gives \$10 Million for Attack Ads*, Wash. Post, Apr. 14, 2012, at A6.

## CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to the Supreme Court of Montana permitting plenary review in this Court of the electoral spending rights, if any, of multi-shareholder business corporations.

Dated: April 27, 2012  
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**AMICUS  
CURIAE  
BRIEF**

**In The  
Supreme Court of the United States**

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AMERICAN TRADITION PARTNERSHIP, INC., f.k.a.  
WESTERN TRADITION PARTNERSHIP, INC., et al.,

*Petitioners,*

v.

STEVE BULLOCK, ATTORNEY GENERAL  
OF MONTANA, et al.,

*Respondents.*

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On Petition For A Writ Of Certiorari  
To The Supreme Court Of The State Of Montana

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**AMICUS CURIAE BRIEF OF FREE SPEECH  
FOR PEOPLE, AMERICAN SUSTAINABLE  
BUSINESS COUNCIL, NOVAK AND NOVAK, INC.,  
D/B/A MIKE'S THRIFTWAY, AND THE AMERICAN  
INDEPENDENT BUSINESS ALLIANCE  
IN SUPPORT OF GRANTING CERTIORARI**

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## TABLE OF CONTENTS

	Page
Interest of <i>Amici Curiae</i> .....	1
Summary of Argument .....	3
Argument .....	4
I. In the Face of the Massive Post- <i>Citizens United</i> "Independent" Spending By Corporate and Wealthy Elites to Influence Political Candidates, this Court's Assumption that Unlimited Independent Expenditures Never Lead to Corruption or the Appearance of Corruption Is No Longer Sustainable as a Matter of Fact or Constitutional Principle.....	4
II. This Court's Precedents Establishing that the Constitution Protects the Rights of Natural – Not Artificial – Persons Require Reconsideration and Rejection of the Principle that the Government Cannot Regulate Independent Expenditures Based on the Corporate Source of the Expenditures.....	13
III. This Court Has Repeatedly Recognized the Government's Legitimate Role in Preventing the Use of Wealth or Other Means of Amplifying Speech From Drowning Out Other Voices and Should Now Reaffirm That Principle in the Context of Campaign Finance Law .....	23
Conclusion.....	28

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Asbury Hosp. v. Cass County, N.D.</i> , 326 U.S. 207 (1945).....	18
<i>Bank of Augusta v. Earle</i> , 38 U.S. 519 (1839) .....	17
<i>Brown v. Hartlage</i> , 456 U.S. 45 (1982) .....	25
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	4, 11, 12
<i>Burroughs v. United States</i> , 290 U.S. 534 (1934).....	13
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 556 U.S. 868 (2009).....	12
<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010) .....	<i>passim</i>
<i>CTS Corp. v. Dynamics Corp. of America</i> , 481 U.S. 69 (1987).....	15
<i>FEC v. Colo. Republican Fed. Campaign Comm.</i> , 533 U.S. 431 (2001) .....	11
<i>FEC v. Wisconsin Right to Life, Inc.</i> , 551 U.S. 449 (2007) .....	11
<i>First Nat'l Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978).....	11, 14, 20, 21, 27
<i>G.M. Leasing Corp. v. United States</i> , 429 U.S. 338 (1977).....	19
<i>Hale v. Henkel</i> , 201 U.S. 43 (1906) .....	18
<i>Kovacs v. Cooper</i> , 336 U.S. 77 (1949).....	24
<i>NAACP v. Ala., ex rel. Patterson</i> , 357 U.S. 449 (1958).....	14

## TABLE OF AUTHORITIES – Continued

	Page
<i>New York Life Ins. Co. v. Dodge</i> , 246 U.S. 357 (1918).....	18
<i>Nixon v. Shrink Mo. Gov't PAC</i> , 528 U.S. 377 (2000).....	11, 12, 25
<i>Northwestern Nat. Life Ins. Co. v. Riggs</i> , 203 U.S. 243 (1906).....	17
<i>Ognibene v. Parkes</i> , 671 F.3d 174 (2d Cir. 2012) .....	25
<i>Okla. Press Pub. Co. v. Walling</i> , 327 U.S. 186 (1946).....	20
<i>Paul v. Virginia</i> , 75 U.S. 168 (1868) .....	17
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969).....	24
<i>Santa Clara County v. Southern Pac. R. Co.</i> , 118 U.S. 394 (1886) .....	22
<i>Trustees of Dartmouth College v. Woodward</i> , 17 U.S. 518 (1819).....	15
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950).....	19
<i>United States v. White</i> , 322 U.S. 694 (1944).....	19
<i>W. Tradition P'ship, Inc. v. Attorney Gen. of State</i> , 271 P.3d 1 (Mont. 2011).....	13, 23



## TABLE OF AUTHORITIES – Continued

	Page
CONSTITUTIONAL AND STATUTORY PROVISIONS	
U.S. Const. amend. I .....	14, 16, 20, 21, 23
U.S. Const. amend. XIV .....	14, 22
Montana Corrupt Practices Act, Mont. Code Ann. 13-35-227 .....	23, 27
OTHER AUTHORITIES	
Andrew Jackson, Fifth Annual Message to Congress (Dec. 3, 1833) .....	16
Grover Cleveland, Fourth Annual Message (Dec. 3, 1888) .....	17
James Madison, <i>To J.K. Paulding, in The Writings of James Madison</i> Vol. 9 (Gaillard Hunt ed., G.P. Putnam's Sons, 1900) .....	15
James Wilson, <i>Of Corporations, in Collected Works of James Wilson</i> Vol. 2, ch. X., (Kermit L. Hall & Mark David Hall eds., 2007) .....	15
Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906) .....	17
Thomas Jefferson, <i>To George Logan, in The Works of Thomas Jefferson</i> Vol. 12 (Paul Leicester Ford ed., Fed. Ed., G.P. Putnam's Sons, 1904-5) .....	16

## INTEREST OF *AMICI CURIAE*

With the parties' consent, *Amici Curiae* file this brief in support of granting *certiorari*.<sup>1</sup>

Free Speech for People is a national non-partisan campaign committed to the propositions that the Constitution protects the rights of people rather than state-created corporate entities; that the people's oversight of corporations is an essential obligation of citizenship and self-government; and that the doctrine of "corporate speech" improperly moves legislative debates about economic policy from the democratic process to the judiciary, contrary to our Constitution. Free Speech for People's thousands of supporters around the country, including in Montana, engage in education and non-partisan advocacy to encourage and support effective government of, for and by the American people.

The American Sustainable Business Council is a coalition of business organizations and businesses committed to advancing policies for a vibrant, fair and sustainable economy. The Council's organizations represent over 100,000 businesses and more than 300,000 entrepreneurs, owners, executives, investors

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<sup>1</sup> The parties were notified ten days prior to the due date of this brief of the intention to file and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

and business professionals, including in Montana. The Council led the formation of Business for Democracy, an initiative of companies and business leaders who believe that *Citizens United v. FEC* is in direct conflict with American principles of republican government, democracy, and a fair economy, and who seek a reversal of the decision.

Novak & Novak, Inc., d/b/a Mike's Thriftway, a Montana corporation, has operated a full-service supermarket employing 26 people, in Chester, Montana since 1971. Novak & Novak, Inc. seeks to conduct its business for which it was chartered under Montana law and does not seek to use company assets to influence the outcome of any election. The corporation seeks to uphold the Montana Corrupt Practices Act to ensure that all businesses are treated equally under Montana law and to prevent the undue influence that would occur by allowing corporations to influence electoral races.

The American Independent Business Alliance (AMIBA) is a Bozeman, Montana-based non-profit organization helping communities implement programs to support independent locally-owned businesses and maintain ongoing opportunities for entrepreneurs. AMIBA supports more than 80 affiliated community organizations across 35 states, including three Montana cities and towns. AMIBA's affiliates represent approximately 22,000 independent businesses covering virtually every sector of business, many of which face direct competition from multinational and other large corporations. Many of these large corporations

have converted their economic power into political favors that disadvantage small business. AMIBA seeks to uphold the Montana Corrupt Practices Act to help ensure market competition, not political favors, determine the success or failure of businesses.

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### SUMMARY OF ARGUMENT

In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Court rejected several justifications for restrictions on corporate spending on elections partly because they were not pressed by the Government or not supported by the record before the Court. As a result, the decision relied on several largely unchallenged assumptions: first, that unlimited “independent” spending on elections never leads to corruption or the appearance of corruption; second, that corporations are the functional equivalent of people and entitled to the same rights as actual people for First Amendment purposes; and third, that preventing unlimited expenditures in our electoral process from drowning out the voices of all but an elite class of global corporations and a fraction of the wealthiest Americans may never serve as a proper governmental interest. The public record and experience developed in the two years since *Citizens United*, during which our election process has come to be dominated by super PACs funded by the corporate and wealthy elite, has placed all three premises in serious doubt. Continued adherence to them will only serve to undermine First Amendment values and the integrity

of our republican democracy itself. The Court should grant *certiorari* and reconsider *Citizens United* in light of these developments over the past two years.

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## ARGUMENT

- I. **In the Face of the Massive Post-*Citizens United* “Independent” Spending By Corporate and Wealthy Elites to Influence Political Candidates, this Court’s Assumption that Unlimited Independent Expenditures Never Lead to Corruption or the Appearance of Corruption Is No Longer Sustainable as a Matter of Fact or Constitutional Principle.**

A fundamental *factual* predicate of *Citizens United* was the Court’s determination “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” 130 S. Ct. at 909. In reaching this conclusion, the Court relied heavily on the similar holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), with respect to independent expenditures of persons. 130 S. Ct. at 908. Whatever the validity of this assumption in 1976 when *Buckley* was decided or even in 2010 when *Citizens United* was decided, it flies in the face of the reality of the super PAC-dominated electoral politics of 2012.

The Court’s unleashing of unlimited corporate funds and the post-*Citizens United* rise of super PACs



have fundamentally altered the nature of our electoral politics and political fundraising:

- Total outside spending, excluding party committees, during the 2010 elections was over \$300 million, more than quadruple the amount during the 2006 elections. [http://www.opensecrets.org/outsidespending/cycle\\_tots.php](http://www.opensecrets.org/outsidespending/cycle_tots.php).<sup>2</sup>
- Independent expenditures from outside groups in the 2012 presidential election year totaled \$95 million by mid-April 2012, more than quadruple the amount for the same time frame in the 2008 election year. [http://www.opensecrets.org/outsidespending/cycle\\_tots.php?cycle=2012&view=Y&chart=N#viewpt](http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=Y&chart=N#viewpt).
- Outside spending, excluding party committees, totaled \$104 million by mid-April in the 2012 election year, of which \$87 million was spent by super PACs. <http://www.opensecrets.org/outsidespending/index.php>.
- From 2010 through 2011, 17% of the itemized funds raised by super PACs – more than \$30 million – came from 566 for-profit businesses. Blair Bowie, U.S. PIRG, & Adam Lioz, Dēmos, *Auctioning Democracy: The Rise of Super PACs & the 2012 Election* 1, 4 (2012), <http://>

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<sup>2</sup> OpenSecrets.org is a non-partisan website run by the Center for Responsive Politics to track money in American politics and its effect on elections and public policy. <http://www.opensecrets.org/about/index.php>.

[www.demos.org/sites/default/files/publications/AuctioningDemocracy-withAppendix.pdf](http://www.demos.org/sites/default/files/publications/AuctioningDemocracy-withAppendix.pdf).<sup>3</sup>

To enjoy the protections provided by *Citizens United* and *Buckley*, contributions made to super PACs are nominally “independent.” But the political reality is that everyone – the candidates, the media, and any citizen who pays attention – knows full well which super PAC supports which candidate: Restore Our Future is pro-Romney (<http://restoreourfuture.com/about/>); Red White and Blue Fund is pro-Santorum (<http://rwbfund.com/>); Priorities USA Action is pro-Obama (<http://www.prioritiesusaaction.org/about/>); and Winning Our Future is pro-Gingrich (<http://www.winningourfuture.com/about/>). See Phil Hirschhorn, *Super PAC Donors by the Numbers*, CBS News, March 22, 2012 (updated March 28), [http://www.cbsnews.com/8301-503544\\_162-57402073-503544/super-pac-donors-by-the-numbers/](http://www.cbsnews.com/8301-503544_162-57402073-503544/super-pac-donors-by-the-numbers/). See also *Citizens United*, 130 S. Ct. at 961-62 (Stevens, J., concurring in part and dissenting in part) (record establishes that elected officials are fully aware and appreciative of the corporations and unions that pay for advertising benefiting their campaigns).

Indeed, specific super PACs and campaigns are so connected that their nominal “independence” only heightens the appearance of corruption. The major

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<sup>3</sup> Dēmos is a non-partisan research and advocacy organization. Bowie & Lioz, *supra*. The U.S. PIRG Education Fund is a non-partisan research and public education organization. *Id.*

presidential super PACs are headed by persons previously involved in the candidate's campaign. <http://factcheck.org/2011/09/restore-our-future/>; <http://factcheck.org/2011/09/priorities-usapriorities-usa-action/>; <http://factcheck.org/2012/01/winning-our-future.><sup>4</sup> Candidates openly express their support for and encourage donations to super PACs supporting their candidacy. In July 2011, Romney appeared at a fund-raising event for Restore Our Future (see Peter H. Stone, *The Center for Public Integrity, Democrats and Republicans Alike are Exploiting New Fundraising Loophole*, iWatch News, July 27, 2011 (updated August 19, 2011), <http://www.iwatchnews.org/2011/07/27/5409/democrats-and-republicans-alike-are-exploiting-new-fundraising-loop-hole>), and in February 2012, President Obama signaled to wealthy supporters to contribute to the super PAC supporting him and that officials from the Obama administration would appear on behalf of Obama at super PAC fundraising events (Jeff Zeleny & Jim Rutenberg, *Obama Yields in Marshaling of 'Super PAC,'* N.Y. Times, February 6, 2012, <http://www.nytimes.com/2012/02/07/us/politics/with-a-signal-to-donors-obama-yields-on-super-pacs.html>).<sup>5</sup> And the

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<sup>4</sup> FactCheck.org is a nonpartisan project of the Annenberg Center for Public Policy that aims to reduce the level of deception and confusion in U.S. politics. <http://factcheck.org/about/>.

<sup>5</sup> The Federal Election Commission has concluded that "officeholders and candidates, and national party officers, may attend, speak at, and be featured guests at fundraisers for [a super PAC] at which unlimited individual, corporate, and labor organization contributions are solicited, so long as they restrict

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Romney campaign and its supporting super PAC share the same political consultant. *Campaign Finance (Super PACs)*, N.Y. Times, updated April 12, 2012, [http://topics.nytimes.com/top/reference/timestopics/subjects/c/campaign\\_finance/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/c/campaign_finance/index.html).

The corrupting influence of corporate spending is not limited to super PACs. In 2010, S&P 500 companies spent \$1.1 billion, contributing \$112 million to state contests, \$30.8 million to nationally registered political committees, and \$979.3 million on federal lobbying efforts. Heidi Welsh & Robin Young, Sustainable Investments Institute, *Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies* 3-4, 9 (2011), [http://www.irrcinstitute.org/pdf/Political\\_Spending\\_Report\\_Nov\\_10\\_2011.pdf](http://www.irrcinstitute.org/pdf/Political_Spending_Report_Nov_10_2011.pdf). The wealthiest corporations (over \$10 billion annual revenue) were responsible for most of these contributions – \$915 million – representing 93 percent of the S&P 500's total. *Id.* at 2, 59. These numbers do not include corporate contributions to non-profit groups, which then funnel the money into political campaigns and lobbying efforts. *Id.* at 14.<sup>6</sup>

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any solicitation they make to funds subject to the limitations, prohibitions and reporting requirements of the [Federal Election Campaign] Act [of 1971]." FEC Advisory Opinion 2011-12 (June 30, 2011), <http://saos.nictusa.com/saos/searchao> (enter AO number "2011-12").

<sup>6</sup> For example, in the 2010 election cycle, the U.S. Chamber of Commerce spent \$31,207,114 on such efforts. Public Citizen's Congress Watch, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process* 10 (2011),

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Major candidates have become so thoroughly dependent on "independent" expenditures that there is no longer a meaningful distinction between independent expenditures and campaign contributions, except that independent expenditures are limitless and thus pose a far greater danger of corruption and the appearance of corruption. As of mid-April 2012, super PACs aligned in support of a specific presidential candidate spent approximately \$80 million in this

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<http://www.citizen.org/documents/Citizens-United-20110113.pdf>. While the U.S. Chamber of Commerce keeps its donor list secret, million dollar plus corporate donations have coincided with specific lobbying efforts by the Chamber. In October 2010, Prudential Financial donated \$2 million to the Chamber to kick off a national advertising campaign to weaken federal financial regulations and Dow Chemical donated \$1.7 million to the Chamber just as the group aggressively fought proposed rules that would impose tighter security requirements on chemical facilities. Eric Lipton, Mike McIntire & Don Van Natta Jr., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N.Y. Times, October 21, 2010, [http://www.nytimes.com/2010/10/22/us/politics/22chamber.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2010/10/22/us/politics/22chamber.html?_r=1&pagewanted=all). The National Rifle Association (NRA) in 2010 spent more than \$7.2 million on independent expenditures at the federal level (<http://www.opensecrets.org/orgs/summary.php?id=D000000082>) and endorsed candidates in about two-thirds of congressional races in the mid-term elections (*The NRA's Electoral Influence*, Washington Post, December 15, 2010, <http://www.washingtonpost.com/wp-srv/special/nation/guns/nra-endorsements-campaign-spending/>). Of those candidates that the NRA endorsed, 80% won. *Id.* A recent report on the NRA reveals that, "[s]ince 2005, corporations – gun related and other – have contributed between \$19.8 million and \$52.6 million to the NRA. . . ." Josh Sugarmann & Marty Langley, Violence Policy Center, *Blood Money: How the Gun Industry Bankrolls the NRA* 1 (2011), <http://www.vpc.org/studies/bloodmoney.pdf>.



election year cycle. <http://www.opensecrets.org/pres12/superpacs.php>. As candidates increasingly depend on super PACs and other independent expenditures, they are far more likely to be corruptly influenced by the corporations and wealthy persons who fund those expenditures than by contributors of capped contributions. See Nicholas Confessore, *SuperPacs Step Up as GOP Candidates Bleeding Cash*, N.Y. Times, Denver Post, Mar. 21, 2012, [http://www.denverpost.com/nationworld/ci\\_20219046/super-pacs-step-up-gop-candidates-bleeding-cash?source=rss](http://www.denverpost.com/nationworld/ci_20219046/super-pacs-step-up-gop-candidates-bleeding-cash?source=rss) (“Republican presidential candidates are running low on campaign cash . . . leaving them increasingly reliant on a small group of supporters funneling millions of dollars in unlimited campaign contributions into super PACs.”) To cite just one example, when one wealthy person, Sheldon Adelson, and his family contribute \$16.5 million to a candidate super PAC over the course of a few weeks (see Hirschhorn, *supra*), it cannot be seriously doubted that it presents a danger of corruption and its appearance exponentially greater than a \$2,500 direct contribution to the candidate’s campaign, which under this Court’s precedent may be prohibited to prevent corruption or the appearance of corruption. *Buckley*, 424 U.S. at 29.<sup>7</sup>

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<sup>7</sup> While Sheldon Adelson is in a super elite class, he is not alone: Harold Simmons: \$15.4 million to Republican super PACs; Bob Perry: \$6.6 million to Republican super PACs.; Jeffrey Katzenberg: \$2 million to pro-Obama super PAC.; and Foster Friess: \$1.6 million to pro-Rick Santorum super PAC. Hirschhorn, *supra*.

This Court has consistently recognized that in the face of a genuine danger of corruption and appearance of corruption of this magnitude, Congress and the states cannot be left powerless to act. *E.g.*, *Buckley*, 424 U.S. at 27 ("Congress could legitimately conclude that the avoidance of the appearance of improper influence [is critical] 'if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) (It "has never been doubted" that legislatures may prevent "the problem of corruption of elected representatives through the creation of political debts."); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (government may act to curb "undue influence on an officeholder's judgment, and the appearance of such influence"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) (corruption includes "broader threat from politicians too compliant with the wishes of large contributors").

Further, from *Buckley* to *Citizens United*, the Court has recognized that a determination that independent expenditures presented a danger of corruption or its appearance might justify restrictions on expenditures. In *Buckley*, the Court recognized that preventing corruption or the appearance of corruption "might also justify limits on electioneering expenditures because it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.'" *FEC v. Wisconsin Right to*

*Life, Inc.*, 551 U.S. 449, 478 (2007) (Roberts, C.J.) (quoting *Buckley*, 424 U.S. at 45); see also *Citizens United*, 130 S. Ct. at 911 (“If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern.”); *id.* at 965 (Stevens, J., concurring in part and dissenting in part) (“Many corporate independent expenditures [have] become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements.”) Indeed, the Court has recently treated independent expenditures made on behalf of an elected judge as equivalent to “contributions” and determined that the expenditures created a “serious, objective risk of actual bias,” *i.e.*, corrupt influence, on the part of the judge. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 886 (2009).<sup>7</sup>

Applying these principles to today’s environment, it can no longer be questioned that independent expenditures create a danger of corruption – including *quid pro quo* corruption – and the appearance of corruption. As Judge Nelson observed in his dissenting opinion below:

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<sup>7</sup> Cf. *Nixon*, 528 U.S. at 409 (Kennedy, J., dissenting) (suggesting that *Buckley*’s limitation on expenditures should be overruled to allow Congress or the states to “devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising”).

In the real world of politics, the “*quid pro quo*” of both direct contributions to candidates and independent expenditures on their behalf is *loyalty*. And, in practical effect, experience teaches that money corrupts, and enough of it corrupts absolutely.

*W. Tradition P'ship, Inc. v. Attorney Gen. of State*, 271 P.3d 1, 35 (Mont. 2011) (Nelson, J., dissenting) (citing *Caperton*, 556 U.S. 868). To deprive the states and Congress of the power to address the undeniable threat of corruption now posed by corporate and other independent expenditures places our republican democracy in grave jeopardy. See *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (“To say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.”)

## II. This Court's Precedents Establishing that the Constitution Protects the Rights of Natural – Not Artificial – Persons Require Reconsideration and Rejection of the Principle that the Government Cannot Regulate Independent Expenditures Based on the Corporate Source of the Expenditures.

The challenge to Montana's regulation of corporate expenditures in state elections, like the challenge to the federal restrictions in *Citizens United*, presumes that corporations are the constitutional equivalent of human beings for purposes of free speech

rights under the First and Fourteenth Amendment. In *Citizens United*, the Court relied on this proposition, apparently without challenge from the Government, and cited to a series of decisions recognizing free speech rights in cases involving corporate parties, with no analysis of whether the rights at issue belonged to the corporate party or specific people acting through the corporation. 130 S. Ct. at 899-900. Thus, *Citizens United* accepted that corporations have free speech rights separate and apart from the rights of any particular persons (e.g., 130 S. Ct. at 898-900, 904-05 (treating corporations as “speakers” and “voices”)), without analyzing the fundamental question whether the First Amendment – or in this case, the free speech component of the Fourteenth Amendment – was ever intended to protect corporations. An examination of the historical record and the nature of corporations – an examination not undertaken in *Citizens United* or the cases on which it relied – demonstrates that the First and Fourteenth Amendment protect the rights of actual people and not corporations.<sup>9</sup>

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<sup>9</sup> Of course, persons acting through corporations (or other legal entities) retain all of their constitutional rights, and corporations often have standing (entirely apart from any theory of corporate personhood) to assert the constitutional rights of actual people. See, e.g., *NAACP v. Ala., ex rel. Patterson*, 357 U.S. 449, 458-59 (1958) (NAACP corporation’s “nexus” with its members provided standing to assert members’ constitutional rights; declining to rely on asserted constitutional rights of corporation itself). See also *Bellotti*, 435 U.S. at 808, n.8 (White, J., dissenting) (First Amendment requires state “neutrality” in

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The corporate legal form is not fundamentally different today than when Chief Justice Marshall for the Court explained that a corporation, as a “mere creature of law . . . possesses only those properties which the charter of its creation confers upon it. . . .” *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). Today, corporations remain “entities whose very existence and attributes are a product of state law.” *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89-91 (1987).

No evidence suggests that the Framers or the American people intended to include corporations in the Bill of Rights. Indeed, the evidence compels the opposite conclusion. The Framers believed, as James Wilson – signer of the Declaration of Independence, member of the Continental Congress, a drafter of the Constitution, and among the nation’s first six Justices – stated, that corporations needed to “be erected with caution, and inspected with care,” lest they “counteract[ ] the design of their original formation.” James Wilson, *Of Corporations*, in *Collected Works of James Wilson* Vol. 2, ch. X., (Kermit L. Hall & Mark David Hall eds., 2007), <http://oll.libertyfund.org/title/2074/166648/2957866>. James Madison viewed corporations as “a necessary evil” subject to “proper limitations and guards.” James Madison, *To J.K. Paulding*, in *The Writings of James Madison* Vol. 9 (Gaillard Hunt ed., G.P. Putnam’s Sons, 1900), <http://oll.libertyfund>.

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allowing businesses engaged in dissemination of information to take advantage of corporate form available to other businesses).

org/title/1940/119324. Thomas Jefferson hoped to "crush in it's [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country." Thomas Jefferson, *To George Logan*, in *The Works of Thomas Jefferson* Vol. 12 (Paul Leicester Ford ed., Fed. Ed., G.P. Putnam's Sons, 1904-5), [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=808&chapter=88352&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=808&chapter=88352&layout=html&Itemid=27). As Justice Stevens concluded in *Citizens United*, the Framers "had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." 130 S. Ct. at 950.

Likewise, since the Founding, the American people and their leaders have recognized the need to prevent corporations from using their economic power to dominate politics. President Jackson warned that the people must choose "whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions." Andrew Jackson, Fifth Annual Message to Congress (Dec. 3, 1833), <http://millercenter.org/scripps/archive/speeches/detail/3640>. "Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters," warned President

Cleveland. Grover Cleveland, Fourth Annual Message (Dec. 3, 1888), <http://millercenter.org/president/speeches/detail/3758>. President Theodore Roosevelt successfully called on Congress to “prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly.” Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), <http://millercenter.org/scripps/archive/speeches/detail/3778>.

This Court, too, has, through most of its history, recognized the distinction between people, whose rights are enshrined in the Constitution, and corporations, which as government-created entities are generally entitled only to the rights established by the law under which they are created. In *Bank of Augusta v. Earle*, 38 U.S. 519 (1839), the Court rejected a claim that a corporation was protected by the Privileges and Immunities Clause, because “[t]he only rights it can claim are the rights which are given to it [by the charter], and not the rights which belong to its members as citizens of a state. . . .” *Id.* at 587. See also *Paul v. Virginia*, 75 U.S. 168, 181 (1868) (a corporation is a “mere creation of local law”), *overruled as to unrelated issue*, *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

The Court continued through the twentieth century to distinguish between people and corporations. For example, the Court has rejected claims that corporations are entitled to the protection of “liberty,” because “[t]he liberty referred to in that [Fourteenth] Amendment is the liberty of natural, not artificial, persons.” *Northwestern Nat. Life Ins. Co. v. Riggs*, 203

U.S. 243, 255 (1906); *see also* *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 387 (1918) (same); *Asbury Hosp. v. Cass County, N.D.*, 326 U.S. 207 (1945) (rejecting corporate privileges and immunities claim).

The Court has applied similar reasoning in holding that corporations have no Fifth Amendment right against self-incrimination:

[T]he corporation is a creature of the state. . . . , incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. . . . Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. . . . While an individual may lawfully refuse to answer incriminating questions. . . . , it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

*Hale v. Henkel*, 201 U.S. 43, 74-75 (1906), *overruled as to unrelated issue*, *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52 (1964). The Court has since reaffirmed *Hale's* rejection of corporate self-incrimination rights:

The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such

organizations so as to nullify appropriate governmental regulations. . . . [T]he privilege against self-incrimination [is] limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

*United States v. White*, 322 U.S. 694, 700-01 (1944).

Again emphasizing the special "public attributes" of corporations, the Court has rejected corporate privacy claims under the Fourth Amendment:

[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.

*United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citations omitted).

The Court has recognized limited Fourth Amendment rights in the context of corporate activity, but it has done so with respect to the privacy interests of a specific person (the corporate General Manager) where the intrusion of "privacy was not based on the nature of [the corporation's] business, its license or any regulation of its activities." *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353-54 (1977). The Court made clear the limitation of its holding, noting that "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be



permissible in a purely private context.” *Id.* at 353. See also *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 205 (1946) (“corporations are not entitled to all of the constitutional protections which private individuals have”).

The Court has also applied the First Amendment in cases involving corporate parties, but, with the exception of *Bellotti*, these cases have implicated the free speech or press interests of actual, specific persons acting through a corporation, and, unlike the case currently before the Court, have not involved laws directed specifically at regulating corporate activity. See *Citizens United*, 130 S. Ct. at 899-900 (collecting free speech and press cases involving corporate parties); *Bellotti*, 435 U.S. at 778, n.14 (same). These cases happened to involve corporate parties but they concerned generally applicable restrictions. See *Bellotti*, 435 U.S. at 822, n.1 (Rehnquist, J., dissenting) (“Our prior cases [applying the First Amendment in cases involving corporate parties] have discussed the boundaries of protected speech without distinguishing between artificial and natural persons.”).

To the extent these cases have been construed to create corporate First Amendment rights independent of the rights of any actual persons, as suggested by the majority in *Citizens United*, this approach fails to account for the special public features of corporations – features which have led this Court to reject claims of corporate constitutional rights in various other contexts. Indeed, failing to distinguish between corporations and people threatens to

undermine, rather than protect, First Amendment speech rights. As Justice Rehnquist aptly observed:

A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist.

*Bellotti*, 435 U.S. at 825-26 (Rehnquist, J., dissenting). See also *id.* at 809-10 (White, J., dissenting) ("[The Government] could permissibly conclude that not to impose limits upon the political activities of corporations would [place] it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities. Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas.")<sup>10</sup>

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<sup>10</sup> While *Citizens United* is certainly not the first case to adopt the fiction of corporate constitutional personhood, this is a concept of dubious historical and doctrinal support. See generally *Bellotti*, 435 U.S. at 824 (Rehnquist, J., dissenting) ("mere

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In the spirit of this Court's long history of distinguishing corporations from persons, one of the dissenting Justices below captured the danger of eroding that distinction:

Corporations are artificial creatures of law. As such, they should enjoy only those powers – not constitutional rights, but legislatively-conferred powers – that are concomitant with their legitimate function, that being limited-liability investment vehicles for business. Corporations are not persons. Human beings are persons, and it is an affront to the inviolable dignity of our species that courts have created a legal fiction which forces people – human beings – to share fundamental, natural rights with soulless creations of government. Worse still, while corporations and human beings share many of the same rights under the law, they clearly are not bound equally to the same codes of good conduct, decency, and morality, and they are not held equally accountable for their sins. Indeed, it is truly ironic that the death penalty and hell are reserved only to natural persons.

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creation of a corporation does not invest it with all the liberties enjoyed by natural persons. . . ."). Indeed, the case traditionally cited as establishing that corporations are people for purposes of the Fourteenth Amendment, *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886), did not actually decide that or any other federal constitutional question. *Id.* at 416 ("As the judgment can be sustained upon this [state law] ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.")

*W. Tradition P'ship*, 271 P.3d at 36 (Nelson, J., dissenting).

Given the importance of the issues raised by this case and the threat to First Amendment values created by the activities unleashed by *Citizens United*, this Court should grant *certiorari* and address whether the challenge to the Montana Corrupt Practices Act, Mont. Code Ann. 13-35-227, must fail because the Act's restriction of corporate spending does not restrict the free speech of any actual persons.

### **III. This Court Has Repeatedly Recognized the Government's Legitimate Role in Preventing the Use of Wealth or Other Means of Amplifying Speech From Drowning Out Other Voices and Should Now Reaffirm That Principle in the Context of Campaign Finance Law.**

In *Citizens United*, the Court observed that: "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." 130 S. Ct. at 899. Ironically, by unleashing unlimited amounts of unregulated corporate treasury funds into our elections, this Court has done precisely that. People exist with or without government; corporations only exist to the extent that governments create them, define them, and provide special legal protections and benefits to facilitate their economic

activities and growth. By facilitating the accumulation of vast amounts of corporate wealth through special benefits and protections, including limited liability and perpetual existence, the government has already created a special class that enjoys special economic benefits and powers, enjoyed by no human being. To then hold the government powerless to prevent those corporate entities from spending unlimited amounts of the resulting wealth to influence our elections is to take "the right to speak from some [all but a tiny elite of mega-wealthy individuals] and giving it to others [government-created corporations]," thereby depriving regular people "of the right to use speech to strive to establish worth, standing, and respect for" their voices.

Indeed, it is precisely this interest in protecting the rights of all persons to "use speech to establish worth, standing and respect" for their views that has led the Court in other areas to recognize the government's authority to prevent the use of wealth or other property from being used to enhance the speech of some, while threatening to drown out the voices of others. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding restrictions on sound truck speech); *id.* at 97 (Jackson, J., concurring) (freedom of speech does not include "freedom to use sound amplifiers to drown out the natural speech of others"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387 (1969) (the broadcaster's right of free speech "does not embrace a right to snuff out the free speech of others.") As Justice Breyer has explained:



The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many – in Congress, for example, where constitutionally protected debate, Art. I, § 6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate.

*Nixon*, 528 U.S. at 402 (Breyer, J., concurring).

This Court's endorsement of prohibitions of vote-buying to prevent undue influence over election results, see *Brown v. Hartlage*, 456 U.S. 45, 54-55 (1982), similarly supports campaign spending restrictions to prevent undue influence in our elections.

The critical problem with vote-buying is not corruption; it is rather that allowing the practice would give the wealthiest individuals a huge effect over political elections, making even their relatively minor preferences matter immensely and the possibly intense preferences of the poor matter not much at all. This same concern, of course, explains why a state has a valid interest in leveling the playing field with respect to campaign contributions [and expenditures].

*Ognibene v. Parkes*, 671 F.3d 174, 200 (2d Cir. 2012) (Calabresi, J., concurring); *id.* at 197 n.2 ("much of what I say applies with equal force to restrictions on independent expenditures").

The government's interest in preventing expenditures by the wealthy from drowning out the rest is even more compelling in today's economic climate, in which only mega-wealthy corporations and individuals can participate in a meaningful way.

The wider the economic disparities in a democratic society, the more difficult it becomes to convey, with financial donations, the intensity of one's political beliefs. People who care a little will, if they are rich, still give a lot. People who care a lot must, if they are poor, give only a little.

*Id.* at 199. And these concerns have been exacerbated in the post-*Citizens United* world in which the wealthiest individuals and corporations magnify their dominant impact through super PACs. See <http://www.opensecrets.org/outsidespending/summ.php?disp=D> ("The top 100 individual donors to super PACs, along with their spouses, represent just 3.0% of all individual donors to super PACs, but 79.4% of the money they delivered.") (emphasis omitted); Bowie & Lioz, *supra*, at 7 (For the years 2010 and 2011, "[m]ore than half of itemized Super PAC money came from just 37 people giving at least \$500,000.")

Restrictions such as the Montana Corrupt Practices Act, directed specifically at corporate spending, are particularly essential, because the significant wealth advantage of the corporations is facilitated by the government itself.

[The government's interest] is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process. . . . The State need not permit its own creation to consume it.

*Bellotti*, 435 U.S. at 809 (White, J., dissenting).

In view of the increasingly dominant role of corporate and private independent expenditures in our electoral politics, this Court should grant *certiorari* and reexamine whether its long-standing precedent permitting regulations designed to prevent the use of wealth from drowning out other voices provides an additional basis for upholding restrictions on independent expenditures.

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## CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant *certiorari*, revisit *Citizens United*, and affirm the judgment below.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**



IN THE  
**Supreme Court of the United States**

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AMERICAN TRADITION PARTNERSHIP, INC., ET AL.,

*Petitioners,*

—v.—

STEVE BULLOCK, ATTORNEY GENERAL OF THE  
STATE OF MONTANA, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MONTANA

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**BRIEF AMICUS CURIAE  
OF SENATOR MITCH MCCONNELL  
IN SUPPORT OF PETITIONERS**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	2
CONCLUSION .....	17

## TABLE OF AUTHORITIES

### Cases

	<u>Page</u>
<i>Austin v. Michigan Chamber of Commerce</i> , 494 U.S. 652 (1990).....	3, 4
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	2, 11, 14, 16
<i>Citizens United v. Federal Election Commission</i> , 558 U.S. ___, 130 S. Ct. 876 (2010).....	<i>passim</i>
<i>Eu v. San Francisco County Democratic Central Committee</i> , 489 U.S. 214 (1989).....	15-16
<i>McConnell v. Federal Election Commission</i> , 540 U.S. 93 (2003).....	1, 3, 4
<i>Nike v. Kasky</i> , 539 U.S. 654 (2003).....	15n
<i>Snyder v. Phelps</i> , 131 S. Ct. 1207 (2011).....	15n
<i>Sorrell v. IMS Health Inc.</i> , 131 S. Ct. 2653 (2011).....	15n

## Law Reviews

Robert H. Bork, *Judge Bork Replies*, 70 A.B.A. J. 132  
(1984) ..... 15n

Robert H. Bork, *Neutral Principles and Some  
First Amendment Problems*, 47 IND. L.J. 1  
(1971) ..... 14n-15n

## Other Authorities

Bob Kerrey, "The Senator from Exxon-Mobil?",  
*Huffington Post* (Jan. 21, 2010) (available at  
[http://www.huffingtonpost.com/bob-kerrey/the-  
senator-from-exxon-mo\\_b\\_431245.html](http://www.huffingtonpost.com/bob-kerrey/the-senator-from-exxon-mo_b_431245.html)) ..... 5n

Editorial, *Justices Strike Down Campaign Finance  
Laws*, San Francisco Chronicle, at A14 (Jan. 22,  
2010) ..... 5n

Editorial, *The Court's Blow to Democracy*, The New  
York Times, Jan. 22, 2010, at A30 ..... 4n-5n

Editorial, *The Supreme Court Removes Important  
Limits on Campaign Finance*, The Washington  
Post, Jan. 22, 2010, at A20 ..... 5n

Interview by Lee Pacchia of Bloomberg Law with  
Bradley Smith, Former Chair, Federal Election  
Commission (Jan. 5, 2012) (available at  
<http://www.youtube.com/watch?v=BvYWdM6n44>)  
..... 11-12

Jacob Sullum, *Big Donors are Fueling Democracy*,  
New York Post, Mar. 15, 2012, at 29..... 11n

Matt Kelly and Fredreka Schouten, *Top donors slice  
gifts to political groups since '04*, USA Today, Jul.  
22, 2008 ..... 11

Press Release, The White House, Office of the Press  
Secretary, Statement from the President on Today's  
Supreme Court Decision (Jan. 21, 2010)..... 7

Red White and Blue Fund, *Meet the Real Mitt Romney*  
(Mar. 15, 2012), <http://rwbfund.com/category/ads/>  
(last visited Apr. 20, 2012)..... 12, 13, 13n

Restore Our Future, *Happy* (Dec. 20, 2011),  
[http://www.youtube.com/watch?v=hjD-IFclRro&con  
text=C458c787ADvjVQa1PpcFOzv8lhjG0FW8KEvh  
RXKpRKR-OWqqC5QBQ](http://www.youtube.com/watch?v=hjD-IFclRro&context=C458c787ADvjVQa1PpcFOzv8lhjG0FW8KEvhRXKpRKR-OWqqC5QBQ) (last visited Apr. 20, 2012)  
..... 12, 13, 13n-14n

Supplemental Brief of Appellee, *Citizens  
United v. Federal Election Commission*, 130  
S. Ct. 876 (2010)..... 4

Winning Our Future, *A Tale of Two Mitts*, (Jan. 10,  
2012),  
[http://www.winningourfuture.com/ blog/Media Cen  
ter/post/Video A flashback to 2008/](http://www.winningourfuture.com/blog/Media-Center/post/Video-A-flashback-to-2008/) (last visited  
Apr. 20, 2012) ..... 12-13, 13n



## INTEREST OF AMICUS CURIAE<sup>1</sup>

Senator Mitch McConnell is the Senior Senator from the Commonwealth of Kentucky and the Republican Leader in the 112th Congress. Senator McConnell was the lead plaintiff in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), litigation challenging, *inter alia*, the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Senator McConnell filed a brief, *amicus curiae*, in *Citizens United v. Federal Election Commission*, 558 U.S. \_\_\_, 130 S. Ct. 876 (2010) ("*Citizens United*"), and his counsel participated in oral argument on his behalf in that case. For many years, Senator McConnell has been a leader in the United States Senate in opposing Congressional efforts to restrict speech about elections in the name of campaign finance reform.

### SUMMARY OF ARGUMENT

The ruling of the Montana Supreme Court is in direct contravention of this Court's ruling in *Citizens United*. Nothing that has occurred since that ruling warrants its reconsideration. In fact, the central concerns expressed by those members of this Court who dissented in *Citizens United* or joined earlier opinions

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel for the parties received timely notice of the intent to file this brief and have consented to its filing.

sustaining campaign finance laws that limited speech have not been borne out by events of the past two years. Corporate donations to the so-called Super PACs created after *Citizens United* have been minimal. Individual donations, already constitutionally protected under *Buckley v. Valeo*, 424 U.S. 1 (1976), have been substantial and have led to more political debate over a lengthier period of time during which more voters had the opportunity to participate in the choice of a presidential candidate.

The *Citizens United* ruling was rooted in long-established First Amendment principles. There is no basis for reconsidering them or the *Citizens United* ruling itself.

## ARGUMENT

From the day it was issued, this Court's ruling in *Citizens United* has been the subject of sustained, overheated, and sometimes irresponsible attack. This is hardly the first time in the Court's history that its application of one or another of the provisions of the Bill of Rights has led to such commentary. Just as *Citizens United* was rooted in the First Amendment, criticism of it is, of course, fully protected by that provision. In this case, however, the Court is confronted with a ruling of the Montana Supreme Court that is disdainful, even scornful, of this Court's ruling and that effectively refuses to abide by it. It is no wonder that, as a result, one of that court's members was obliged to remind his colleagues that "when the highest court in the country has spoken clearly on a matter of federal constitutional law, as it did in *Citizens United* . . . this Court . . . is not at liberty to disregard or parse that decision in order to uphold a state law

that, while politically popular, is clearly at odds with the Supreme Court's opinion." App. 47a.

The petition for a writ of certiorari in this case sets forth persuasively the nature of the conflict between *Citizens United* and the ruling of the Montana Supreme Court and the reasons why summary reversal is appropriate. This brief, *amicus curiae*, is submitted to advise the Court of events that have occurred since the *Citizens United* ruling, events that further support the correctness of that ruling and the absence of any basis to reconsider, let alone reverse, it.

We begin with the nature of the concerns expressed by those who opposed the ruling. In one opinion after another, whether in the majority or in dissent, those members of this Court who have concluded that state and federal campaign finance laws limiting speech were constitutional have expressed their disquiet with what they perceived as the visage of illicit corporate dominance of the electoral process. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 669 (1990), this Court concluded that the Michigan Campaign Finance Act, at issue in that case, "reduce[d] the threat that huge corporate treasuries amassed with the aid of state laws will be used to influence unfairly the outcome of elections," and that the statute at issue addressed "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form. . . ." *Id.* at 660. In *McConnell v. Federal Election Commission*, 540 U.S. 93, 115 (2003), the majority quoted with approval Elihu Root's assertion that legislation was required to prevent "the great aggregations of wealth, from using their corporate funds, directly or indirectly' to elect legislators who would 'vote for their

protection and the advancement of their interests as against those of the public.” And when *Citizens United* overruled both those rulings, the dissenting opinion of Justice Stevens expressed concern that “[t]he influx of unlimited corporate money into the electoral realm . . . creates new opportunities for the mirror image of quid pro quo deals: threats both explicit and implicit. Starting today, corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests.” 130 S. Ct. at 965-66.

The submission of the United States to this Court in *Citizens United* offered its own doomsday scenario about the consequences of overruling *Austin* and the relevant portion of *McConnell*. Fortune 100 companies, the government argued, had “combined revenues of \$13.1 trillion and profits of \$605 billion. If those 100 companies alone had devoted just one percent of their profits (or one-twentieth of one percent of their revenues) to electoral advocacy, such spending would have more than doubled the federally-reported disbursements of all American political parties and PACs combined.” Such an “amount of corporate spending,” the government urged, “could dramatically increase the reality and appearance of quid pro quo corruption.” Supplemental Brief of Appellee at 17, *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010) (No. 08-205).<sup>2</sup>

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<sup>2</sup> Large elements of the press offered similar predictions after *Citizens United* was released. See, e.g., Editorial, *The Court's Blow to Democracy*, *The New York Times*, Jan. 22, 2010, at A30 (“the court’s conservative majority has paved the way for

Over two years have passed since the *Citizens United* ruling. One national election has been held and a vigorously fought primary campaign has been waged in a large number of states around the nation to choose a Republican candidate to run against President Obama this year. In that time period, nothing has occurred to warrant reconsideration of *Citizens United*. The First Amendment barrier to such legislation has not diminished. And there is no basis for concluding that any quid pro quo corruption, the only kind that this Court has found relevant, has occurred as a result of the ruling. *Citizens United*, 130 S. Ct. at 909-10. While the issue of what creates the "appearance" of corruption is necessarily subjective in nature,

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corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding"); Editorial, *The Supreme Court Removes Important Limits on Campaign Finance*, *The Washington Post*, Jan. 22, 2010, at A20 ("[the decision] was dangerous because corporate money, never lacking in the American political process, may now overwhelm both the contributions of individuals and the faith they may harbor in their democracy"); Editorial, *Justices Strike Down Campaign Finance Laws*, *San Francisco Chronicle*, Jan. 22, 2010, at A14 ("Voters should prepare for the worst: cash-drenched elections presided over by free-spending corporations"); Bob Kerrey, *The Senator from Exxon-Mobil?*, *Huffington Post*, Jan. 21, 2010 (available at [http://www.huffingtonpost.com/bob-kerrey/the-senator-from-exxon-mo\\_b\\_431245.html](http://www.huffingtonpost.com/bob-kerrey/the-senator-from-exxon-mo_b_431245.html)) ("What does this ruling mean? Consider the influence of a single corporation like Exxon Mobil. . . . With \$85 billion in profits during the 2008 election, Exxon Mobil would have been able to fully fund over 65,000 winning campaigns for U.S. House. . . .").



we are aware of no basis for concluding that there has been any change in that area as well.<sup>3</sup>

Such conclusions should occasion no surprise. At the time *Citizens United* was decided, 26 states imposed no restrictions on the amount of independent expenditures by for-profit corporations. *Citizens United*, 130 S. Ct. 908. There was not then any basis for concluding that corporate spending in those states (including states rarely associated with scandalous behavior, such as Virginia, Washington, and Utah) had "corrupted the political process," and the United States made no claim to that effect. *Id.* at 909. The same is true today.

What is new, however, is that there are now facts that bear on the concerns expressed by critics of the ruling. A review of FEC records for independent expenditure-only committees — i.e. the so-called Super PACs — supporting the eight leading Republican Presidential candidates has evidenced minimal corporate involvement in the 2012 election cycle.<sup>4</sup> For ex-

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<sup>3</sup> We do not believe that published criticism of the Court's ruling in *Citizens United*, however repeated and with whatever impact it may have had on public opinion, can constitute the sort of "appearance of corruption" that can warrant overcoming what would otherwise constitute First Amendment protected speech. If it did, the mere recitation of criticism could carry the day, an unacceptable result in any case and surely one in a case in which the right of free expression is at stake.

<sup>4</sup> The FEC records for the following eight Super PACs were reviewed: Winning Our Future (supporting Newt Gingrich), Restore Our Future, Inc. (supporting Mitt Romney), Red White and Blue Fund (supporting Rick Santorum), Make Us Great Again, Inc. (supporting Rick Perry), Endorse Liberty, Inc. (sup-

ample, notwithstanding the government's hypothetical positing of enormous political expenditures by Fortune 100 companies, we now know that not a single one of the Fortune 100 companies has contributed a cent to any of these eight Super PACs — a fact discernable from records filed with the Federal Election Commission in accordance with disclosure requirements upheld in *Citizens United*.<sup>5</sup> That includes what President Obama referred to, in the course of his denunciation of the ruling, as “big oil, Wall Street banks [and] health insurance companies,” all of which, he asserted, had attained a “victory” in *Citizens United*. Press Release, The White House, Office of the Press Secretary, Statement from the President on Today's Supreme Court Decision (Jan. 21, 2010).

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porting Ron Paul), Our Destiny PAC (supporting Jon Huntsman), 9-9-9 Fund (supporting Herman Cain), and Keep Conservatives United (supporting Michele Bachmann).

<sup>5</sup> Analysis was performed for all contributions received by the eight Super PACs through March 31, 2012 of the 2011-2012 Election Cycle. For contributions received on or before February 29, 2012, FEC-compiled reports of individual and committee contributions were reviewed for each Super PAC. These reports can be accessed through the Committee Search link on the FEC's Campaign Finance Disclosure Portal. For contributions made between March 1, 2012 and March 31, 2012, contribution information was obtained from the Schedule A section (“Itemized Receipts”) on each Super PAC's FEC Form 3X (“Reports of Receipts and Disbursements For Other Than An Authorized Committee”). These forms can be accessed through the Report Image Search link on the FEC's Campaign Finance Disclosure Portal.

A review of FEC records for the eight Super PACs referenced above reveals that a total of \$96,410,614 has been contributed to those Super PACs through March 31, 2012. The chart that follows sets forth the total amount contributed to all Super PACs supporting those eight candidates and the amount contributed to each Super PAC supporting each candidate:

<b>Total Amount Contributed to Super PACs:</b>	<b>\$96,410,614</b>
Gingrich	\$23,808,236
Romney	\$51,962,295
Santorum	\$8,150,420
Perry	\$5,585,174
Paul	\$3,588,098
Huntsman	\$3,165,044
Cain	\$124,597
Bachmann	\$26,750

We also know exactly how much money has been donated by all corporations to those Super PACS. Of the total of \$96,410,614 contributed to Super PACs supporting those candidates, \$83,220,167 — 86.32% — was contributed by individuals and \$13,190,447 — 13.68% — by corporations as shown in the charts that follow.

<b>Total Amount Contributed by Individuals</b>	<b>\$83,220,167</b>
Gingrich	\$23,807,236
Romney	\$40,959,795
Santorum	\$7,977,973
Perry	\$3,593,174
Paul	\$3,565,598
Huntsman	\$3,165,044
Cain	\$124,597
Bachmann	\$26,750

<b>Total Amount Contributed by Corporations</b>	<b>\$13,190,447</b>
Gingrich	\$1,000
Romney	\$11,002,500
Santorum	\$172,447
Perry	\$1,992,000
Paul	\$22,500
Huntsman	\$0
Cain	\$0
Bachmann	\$0

<b>Total Percentage of All Contributions</b>	
By Individuals	86.32%
By Corporations	13.68%

And, as the data reveals, of the entire \$96,410,614, 86.32% was contributed by individuals, 12.87% by privately held corporations and less than one percent — 0.81% — by public companies.

<b>Total Percentage of All Contributions</b>	
Individual	86.32%
Private Company	12.87%
Public Company	0.81%

Of total corporate contributions, \$12,410,447 — 94.09% — was contributed by privately held corporations and \$780,000 — 5.91% — by public corporations.

<b>Breakdown of Corporate Donors</b>		
<b>Super PAC</b>	<b>Private</b>	<b>Public</b>
Gingrich	\$1,000	\$0
Romney	\$10,622,500	\$380,000
Santorum	\$172,447	\$0
Perry	\$1,592,000	\$400,000
Paul	\$22,500	\$0
Huntsman	\$0	\$0
Cain	\$0	\$0
Bachmann	\$0	\$0
<b>TOTAL</b>	<b>\$12,410,447</b>	<b>\$780,000</b>

<b>Total Percentage of Corporate Contributions</b>	
Private	94.09%
Public	5.91%

As the data reflects, the Super PACs supporting three of the eight candidates received no corporate donations at all and six of the eight received none from public companies. Put another way, the much predicted corporate tsunami simply did not occur.

As for independent expenditures by individuals, the numbers cited above indicate a considerable in-



crease in the amount of funds expended. The law had been clear since *Buckley* that individuals could make unlimited independent expenditures in support of a candidate's campaign. As a result, large sums had been spent supporting or opposing candidates for election by individuals ranging from those who paid for the anti-Kerry Swift Boat advertisements in the 2004 campaign to wealthy individuals such as George Soros who spent over \$24 million dollars supporting Democratic candidates that same year. Matt Kelley and Fredreka Schouten, *Top donors slice gifts to political groups since '04*, USA Today, Jul. 22, 2008.

The large amounts of individual independent expenditures during the contested 2012 Republican nomination battle may stem from a number of factors – the level of ideological dispute within the party, the intensity of the desire of Republicans to choose the strongest candidate to oppose President Obama and/or the extraordinary level of publicity regarding the *Citizens United* ruling. Whatever the reasons, the result of those expenditures has been far more political speech in 2012 than would otherwise have been the case. Races, as one observer has pointed out, have been “less predictable and more interesting, boosting candidates who would’ve been crippled by a lack of money.”<sup>6</sup> As another concluded, “[t]his is our second election under *Citizens United*. . . . In 2010, turnout was up from 2006, we had more competitive races than at almost any time in recent memory. In fact . . . over the last three years we’ve had the best public de-

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<sup>6</sup> Jacob Sullum, *Big Donors are Fueling Democracy*, New York Post, Mar. 15, 2012, at 29.

bate about the overall size and scope of the federal government — What do we want government to do? Where do we want to go — that we've had since the civil rights era." Interview by Lee Pacchia of Bloomberg Law with Bradley Smith, Former Chair, Federal Election Commission (Jan. 5, 2012) (available at <http://www.youtube.com/watch?v=BvYWdM6n44>).

Consider the advertisements themselves that have been funded by the independent expenditures discussed above. We have chosen, by way of example, three that were shown during the primary contests within the Republican Party — one broadcast by a pro-Gingrich Super PAC ("Winning Our Future"), a second broadcast by a pro-Santorum one ("Red White and Blue") and a third by one that is pro-Romney ("Restore our Future"). They are, as would be expected, pure political speech of the sort that the First Amendment most indisputably protects.

The "Winning Our Future" advertisement was a rebroadcast of one from the McCain campaign in 2008 when Senator McCain was seeking the Republican nomination and Governor Romney was one of his opponents. Entitled "A Tale of Two Mitts," it shows 11 clips of Governor Romney taking what are arguably inconsistent positions. In two of them, for example, he supports "a woman's right to choose" to have an abortion; in another, he states he is "pro-life." In one he supports "tough gun laws in Massachusetts" and in another he states that he "support[s] the Second Amendment." In one he states that he was "an independent during the time of Reagan-Bush"; in another

he states that "I'm not trying to return to Reagan-Bush"; in a third, he states that [i]t's time for Republicans to start acting like Republicans."<sup>7</sup>

The advertisement offered by "Red White and Blue" stated: "Meet the real Mitt Romney: supported by the Wall Street Bailout, putting America's trillions in debt; raised job-killing taxes and fees by 700 million, leaving Massachusetts over a billion in debt, his healthcare takeover — the blueprint for Obama-care. Mitt Romney — more debt and taxes, less jobs, more of the same." It concludes "Rick Santorum — a bold plan for the middle class; create dynamic jobs and cut wasteful spending. Rick Santorum for President."<sup>8</sup>

The "Restore Our Future" ad begins with the statement "You know what makes Barack Obama happy? Newt Gingrich's baggage. Newt has more baggage than the airlines." The advertisement then cites a number of instances in which it claims Speaker Gingrich had acted, in one way or other, improperly — i.e. being paid "\$30,000 an hour" and \$1,600,000 in total by Freddie Mac which "helped cause the recession"; working with Nancy Pelosi on solutions to global warming; supporting "taxpayer funding of some abortions"; and being "the only speaker in history to be reprimanded."<sup>9</sup>

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<sup>7</sup> The complete advertisement can be viewed at [http://www.winningourfuture.com/blog/Media\\_Center/post/Video\\_A\\_flashback\\_to\\_2008/](http://www.winningourfuture.com/blog/Media_Center/post/Video_A_flashback_to_2008/).

<sup>8</sup> The complete advertisement can be viewed at <http://rwbfund.com/category/ads/>.

<sup>9</sup> The complete advertisement can be viewed at

These and other political advertisements have been the subject of criticism, sometimes on the merits as to what they convey, sometimes on the ground that the very existence of Super PACs funded by wealthier elements of our society is problematic in a democratic society. The first criticism is a staple of all political campaigns. People routinely disagree about what the facts are with respect to candidates for public office and which opinions about them should be taken seriously. The second criticism may be worthy of debate but is flatly at odds with this Court's conclusion in both *Buckley* and *Citizens United* that "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Citizens United*, 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48-49).

What should ultimately guide the Court, we suggest, is not what has supposedly changed in the past two years but what has remained unchanged since the founding of this nation. The First Amendment has not changed. Indeed, it is so well-established that the First Amendment is especially protective of political speech and so rare that such speech is the subject of attempted regulation or censorship that most First Amendment battles have been fought over other questions such as how far *beyond* political speech the First

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[http://www.youtube.com/watch?v=hjD\\_lFclRro&context=C458c7s7ADvjVQa1PpcFOzv8thlG0FW8KEvhRXKpRKr-OWqqC5QBQ](http://www.youtube.com/watch?v=hjD_lFclRro&context=C458c7s7ADvjVQa1PpcFOzv8thlG0FW8KEvhRXKpRKr-OWqqC5QBQ).

Amendment provides protection,<sup>10</sup> how closely the protections afforded to less protected speech track those afforded to political speech,<sup>11</sup> and how to characterize the particular speech at issue.<sup>12</sup>

What cannot be subject to serious debate is that the speech at issue here — speech, that is, that was criminal prior to *Citizens United* — is what the First Amendment protects with the greatest level of vigilance. It remains the case, as Justice Kennedy's opinion in *Citizens United* reiterates, that the First Amendment “has its fullest and most urgent applica-

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<sup>10</sup> See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971) (arguing that “[c]onstitutional protection should be accorded only to speech that is explicitly political”). Judge Bork later changed his position on that issue. See Robert H. Bork, *Judge Bork Replies*, 70 A.B.A. J. 132 (1984).

<sup>11</sup> See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (applying heightened scrutiny to content-based statute in commercial context); *id.* at 2673 (Breyer, J. dissenting).

<sup>12</sup> See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (Roberts, C.J., writing for the Court and holding that picketing near site of military funeral was protected speech because that speech “was at a public place on a matter of public concern”); *id.* at 1226 (Alito, J., dissenting, because the speech at issue went “far beyond commentary on matters of public concern” in that it attacked the “purely private conduct” of a “private figure”); *Nike v. Kasky*, 539 U.S. 654 (2003) (dismissing writ of certiorari as improvidently granted); *id.* at 663-64 (Stevens, J., concurring in dismissal because *inter alia*, “the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance”); *id.* at 667 (Breyer, J., dissenting, because “the questions presented directly concern the freedom of Americans to speak about public matters in public debate”).



tion' to speech uttered during a campaign for political office," *Citizens United*, 130 S. Ct. at 898 (quoting *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) (internal citation omitted)), and that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 898. And it remains true, as set forth in *Buckley* and repeated with approval in *Citizens United*, that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* (quoting *Buckley*, 424 U.S. at 14). That is what *Citizens United* was about and what this case is about.

## CONCLUSION

For the same reasons that this Court ruled as it did in *Citizens United*, a writ of certiorari should issue and the ruling of the Montana Supreme Court should be summarily reversed.

April 26, 2012

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**



**In The  
Supreme Court of the United States**

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AMERICAN TRADITION PARTNERSHIP, INC., fka  
WESTERN TRADITION PARTNERSHIP, INC., et al.,

*Petitioners,*

v.

STEVE BULLOCK,  
Attorney General of Montana, et al.,

*Respondents.*

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On Petition For A Writ Of Certiorari To The  
Supreme Court Of The State Of Montana

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**AMICUS CURIAE BRIEF OF  
RETIRED JUSTICES OF THE MONTANA  
SUPREME COURT AND JUSTICE AT STAKE  
IN SUPPORT OF RESPONDENTS**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT.....	5
I. The dramatic increase in independent expenditures in judicial elections has adversely impacted the judiciary's effective functioning .....	7
A. Judicial election spending by outside interest groups has been skyrocketing ....	7
B. The dramatic increase in judicial election spending has created the widespread appearance that justice is for sale .....	13
II. The States' ability to regulate judicial election spending must be decided within the balance of competing constitutional rights of free speech and due process .....	16
III. The States have a compelling state interest in maintaining the integrity and independence of their judiciaries .....	17
IV. Individual " <i>Caperton</i> " motions will not vindicate the States' compelling state interest in maintaining the integrity of the judiciaries, nor protect litigants' due process rights.....	21
CONCLUSION .....	24



## TABLE OF AUTHORITIES

	Page
CASES	
<i>American Tradition Partnership v. Bullock</i> , 132 S. Ct. 1307 (2012).....	3
<i>Bridges v. California</i> , 314 U.S. 252 (1941).....	16
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 129 S. Ct. 2252 (2009).....	passim
<i>Citizens United v. Federal Election Comm'n</i> , 130 S. Ct. 876 (2010).....	passim
<i>Commonwealth Coatings Corp. v. Cont'l Cas. Co.</i> , 393 U.S. 145 (1968).....	19
<i>In re Independent Pub. Co.</i> , 240 F. 849 (9th Cir. 1917).....	16
<i>McConnell v. Federal Election Comm'n</i> , 540 U.S. 93 (2003).....	19
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	19
<i>Nebraska Press Ass'n v. Stuart</i> , 427 U.S. 539 (1976).....	16, 18
<i>Nevada Comm'n on Ethics v. Carrigan</i> , 131 S. Ct. 2343 (2011).....	19
<i>Republican Party of Minn. v. White</i> , 536 U.S. 765 (2002).....	18, 19
<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009).....	10
<i>Western Tradition Partnership, Inc. v. Bullock</i> , 2011 MT 328, 363 Mont. 220, 271 P.3d 1 .....	4, 18, 22

## TABLE OF AUTHORITIES – Continued

## Page

## STATUTES

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20/20 Insight LLC, <i>Wisconsin Registered Voter Survey</i> (July 18-20, 2011), available at <a href="http://www.justiceatstake.org/media/cms/WI_Merit_Poll_Results_734DCFE0AA5C8.pdf">http://www.justiceatstake.org/media/cms/WI_Merit_Poll_Results_734DCFE0AA5C8.pdf</a> .....	15
20/20 Insight LLC, <i>National Registered Voter Survey</i> (Oct. 10-11, 2011), available at <a href="http://www.justiceatstake.org/media/cms/NPJE2011_poll_7FE4917006019.pdf">http://www.justiceatstake.org/media/cms/NPJE2011_poll_7FE4917006019.pdf</a> .....	13
American`Judicature Society, <i>Judicial Selection in the States: Appellate and General Jurisdiction Courts: Initial Selection, Retention, and Term Length</i> (undated) available at <a href="http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_1196092850316.pdf">http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_1196092850316.pdf</a> .....	4
Anzalone Liszt Research, Inc., <i>Justice at Stake West Virginia 2010 Poll</i> (Feb. 21-24, 2010), available at <a href="http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf">http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf</a> .....	14
Debra Lyn Bassett, <i>Judicial Disqualification in the Federal Appellate Courts</i> , 87 Iowa L. Rev. 1213 (2002) .....	22
James Bopp, Jr. and Josiah Neeley, <i>How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing</i> , 86 Den. U.L. Rev. 195 (2008) .....	15

## TABLE OF AUTHORITIES – Continued

	Page
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Charles Hall, ed., <i>Justice at Stake, The New Politics of Judicial Elections 2009-2010</i> (2011), available at <a href="http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf">http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf</a> .....	8, 9, 10, 12, 23
<i>The Harris Poll National Quorum Justice at Stake Campaign</i> (June 9-13, 2010), available at <a href="http://www.justiceatstake.org/media/cms/The_Harris_Poll_National_Quorum_Jus_F847FF6BF6CD0.pdf">http://www.justiceatstake.org/media/cms/The_Harris_Poll_National_Quorum_Jus_F847FF6BF6CD0.pdf</a> .....	14
Larry Howell, <i>Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings</i> , 73 Mont. L. Rev. 25 (2012) .....	5, 6
Justice at Stake, <i>Nasty Campaign Deepens 'Crisis' for Wisconsin High Court</i> (Apr. 6, 2011), available at <a href="http://www.justiceatstake.org/newsroom/press-releases-16824/?nasty_campaign_deepens_crisis_for_wisconsin_high_court&amp;show=news&amp;newsID=10401">http://www.justiceatstake.org/newsroom/press-releases-16824/?nasty_campaign_deepens_crisis_for_wisconsin_high_court&amp;show=news&amp;newsID=10401</a> .....	9
Patrick Marley and Don Walker, <i>Court Allows Union Limits</i> , Milwaukee Journal Sentinel (June 15, 2011, at A1) .....	9
Lord MacMillan, <i>Law and Other Things</i> (1937) .....	21

## TABLE OF AUTHORITIES – Continued

	Page
Josh Nelson, <i>Chief Justice: Don't Politicize Judicial System</i> , Waterloo-Cedar Falls Courier (Oct. 21, 2010) .....	10, 11
Paul J. Nyden, <i>Mining Appeal Moving Along: Olson to Argue Harman Case Against Massey Before Supreme Court</i> , Charleston Gazette (May 16, 2008).....	15
Rich Robinson, <i>\$70 Million Hidden in Plain View: Michigan's Spectacular Failure of Campaign Finance Disclosure, 2000-2010</i> (June 2011), available at <a href="http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf">http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf</a> .....	23
Jesse Rutledge, ed., <i>Justice at Stake, The New Politics of Judicial Elections 2006</i> (2007), available at <a href="http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf">http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf</a> .....	12
James Sample, et al., <i>Justice at Stake, The New Politics of Judicial Elections 2000-2009</i> (2010), available at <a href="http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpqv.pdf">http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpqv.pdf</a> .....	7, 8, 11
Emily Schettler, <i>Iowa Chief Justice Visits Area</i> , Iowa City Press-Citizen (May 21, 2011, at A3) .....	11
The Tarrance Group, Inc., <i>Minnesota Statewide Registered Voter Survey</i> (May 1-2, 2012), available at <a href="http://www.justiceatstake.org/media/cms/MN_Statewide_Justice_Survey_170811AFB695E.pdf">http://www.justiceatstake.org/media/cms/MN_Statewide_Justice_Survey_170811AFB695E.pdf</a> .....	14

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are eight of the eleven living<sup>2</sup> retired Justices of the Montana Supreme Court – Diane Barz, William E. Hunt, Sr., W. William Leaphart, R.C. McDonough, James M. Regnier, Terry N. Trieweler, Jean Turnage, and John Warner – and Justice at Stake.

These retired Justices filed a brief as *amici curiae* before the Montana Supreme Court asking that court to uphold the law challenged in this case. They have all run nonpartisan statewide campaigns for election to the Montana Supreme Court, or have been appointed to the Montana Supreme Court and, with one exception, faced subsequent re-election. These *amici* are interested in the issue before the Court because the *Citizens United* paradigm authorizing corporate political speech implicates the fundamental due process rights of litigants, as well as the

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<sup>1</sup> The parties were notified ten days prior to the due date of this brief of the intention to file. The parties' letters of consent to the filing of this brief have been filed with the Clerk. *Amici* state that no counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. Matthew Lee Wiener, while affiliated with the firm of Cuneo Gilbert & LaDuca, LLP, assisted in the preparation of this brief.

<sup>2</sup> The three other retired Justices are: Judge Charles E. Erdmann, who is currently sitting on the Military Court of Appeals; Justice John C. Sheehy, who is 93 years old; and former Chief Justice Karla M. Gray, who has not participated in any *amicus curiae* efforts since her retirement in 2008.



compelling state interest in preserving a fair and independent judiciary.

Justice at Stake is a nonpartisan campaign of more than fifty organizations working to keep the courts fair and impartial. Justice at Stake and its partner organizations educate the public and work for reforms to ensure special interests do not affect judicial proceedings.<sup>3</sup>

*Amici* are united in their concern that skyrocketing spending in state judicial elections – especially expenditures from corporate and union treasuries – impermissibly impacts litigants' constitutional due process rights, and erodes the public's confidence that the judiciary is fair and impartial. Invalidating laws like Montana's leaves states powerless to protect these important interests.

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## SUMMARY OF ARGUMENT

*Amici* join Respondents in asking the Court to deny the petition for a writ of certiorari because the decision of the Montana Supreme Court does not conflict with *Citizens United v. Federal Election Commission*.<sup>4</sup>

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<sup>3</sup> The arguments expressed in this brief do not necessarily reflect the opinions of every Justice at Stake partner organization or board member. Members of Justice at Stake's board of directors who are judges did not participate in the formulation or approval of this brief.

<sup>4</sup> 130 S. Ct. 876 (2010).

Instead, the Montana Supreme Court's decision below directly addressed the constitutional tension between *Citizens United* and *Caperton v. A.T. Massey Coal Co., Inc.*,<sup>5</sup> and held that, within the context of Montana's compelling state interest in protecting the integrity of its courts, the Corrupt Practices Act struck a proper balance between the competing constitutional rights of due process and free speech.

If this Court concludes otherwise and grants the petition, it should docket the case for full briefing and argument. As two Justices of this Court put in their statement respecting the stay, it may be time to consider "whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway."<sup>6</sup> As it relates to judicial elections, this question cannot be answered without carefully considering the competing constitutional rights at issue. The proper balance is essential to the integrity of independent judiciaries, which are fundamental to the fabric of our system of government.

Enormous special interest expenditures in state judicial elections are threatening one of the Constitution's most central guarantees – the right to due process and a fair trial. The compelling state interest in maintaining fair, impartial courts has been

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<sup>5</sup> 129 S. Ct. 2252 (2009).

<sup>6</sup> *American Tradition Partnership v. Bullock*, 132 S. Ct. 1307 (2012) (statement Ginsburg, J., joined by Breyer, J., respecting grant of application for stay).

endangered by the surge in judicial campaign spending, creating the appearance and expectation that judges are beholden to special interests. These interests were not addressed in *Citizens United*, and are ripe for substantive consideration by this Court.

Invalidating state laws on the authority of *Citizens United* cripples the ability of the 39 states whose judges are elected to maintain the integrity of their judiciaries.<sup>7</sup> Contrary to the suggestion of Petitioners' *amicus*, *Citizens United*, case-by-case recusal by judges simply cannot vindicate this compelling state interest. The Petitioners' parallel challenges to Montana's disclosure requirements<sup>8</sup> demonstrate the practical impossibility of bringing these types of motions.

These important considerations are unique to the constitutional status of state laws regulating independent expenditures by corporations in judicial

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<sup>7</sup> See generally American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts: Initial Selection, Retention, and Term Length*, available at [http://www.judicialselection.us/uploads/documents/Selection\\_Retention\\_Term\\_1196092850316.pdf](http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_1196092850316.pdf).

<sup>8</sup> *Western Tradition Partnership, Inc. v. Bullock*, 2011 MT 328, ¶9, 363 Mont. 220, 271 P.3d 1 (noting that in Montana state and federal courts “Western Tradition appears to be engaged in a multi-front attack on both contribution restrictions and the transparency that accompanies campaign disclosure requirements . . . challeng[ing] the constitutionality of most of the limits and disclosure requirements contained in §13-37-216, MCA.”).

elections, and they counsel strongly against a summary disposition of this case.<sup>9</sup>

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## ARGUMENT

Erosion of public trust in the judiciary was the exact concern that led Montana citizens to enact the Corrupt Practices Act in 1912 through a citizens' initiative. At that time, state trial judges had literally been bought by the Copper Kings to do their bidding – resulting in corruption of the highest order – even though *quid pro quo* bribery was never proven.<sup>10</sup>

For example, in 1903, following an adverse district court decision in favor of a competitor, Amalgamated Copper shut down its mines in protest and laid off 15,000 workers – the majority of wage earners in Montana at the time. The corporation blackmailed Governor Toole into calling a special session of the Legislature to adopt a bill allowing a judge to be removed on a simple charge of bias – thereby allowing the corporation to have its cases heard only by judges

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<sup>9</sup> *Citizens United*, 130 S. Ct. at 968 (Stevens, J., joined by Ginsburg, Breyer, & Sotomayor, JJ.) (dissenting) (noting the unaddressed “consequences” of the Court’s holding on state judicial elections).

<sup>10</sup> See Howell, Larry, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 Mont. L. Rev. 25 (2012) (describing the bribery, corruption and favors that characterized this “colorful” period of history for the Montana judiciary).

it approved of or literally "owned."<sup>11</sup> In the face of certain economic ruin, the Legislature passed the "Fair Trials Bill." Amalgamated Copper promptly sent the miners back to work, assured the judiciary would protect its economic interests.

The public's right to due process and confidence in the integrity and independence of state judicial systems is now being undermined again by the dramatic increase in independent expenditures by special interest groups. Only through narrowly tailored state campaign finance regulations can these interests be protected, especially in sovereign states like Montana whose citizens have adopted constitutional provisions for the nonpartisan popular election of judges. As demonstrated below, while the "Copper Kings are a long time gone to their tombs,"<sup>12</sup> their specter hangs over Montana. The Corrupt Practices Act has insulated Montana's courts from the factors that have diminished public confidence in courts across the country; without it, Montana may find its courts once again bought by corporate special interests.

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<sup>11</sup> Howell, *supra* note 10, at 39-41.

<sup>12</sup> *Id.* at 25.



**I. The dramatic increase in independent expenditures in judicial elections has adversely impacted the judiciary's effective functioning.**

The surge in spending in judicial elections has already had a profound and detrimental impact on the public's confidence in the integrity and independence of state judicial systems.

**A. Judicial election spending by outside interest groups has been skyrocketing.**

Between 2000 and 2009, state high court candidates raised and spent over \$206.9 million nationally in their judicial elections.<sup>13</sup> That is more than double the \$83.3 million raised for the same purpose from 1990 to 1999.<sup>14</sup> All but two of the 22 states with contestable high court elections had their costliest-ever contests between 2000 and 2009.<sup>15</sup>

Despite this surge in candidate fundraising, independent spending by special interest groups frequently has dwarfed spending by the candidates themselves. These special interest "super-spenders," which are strikingly similar to the super PACs now fueling national campaigns, have added to the spending records

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<sup>13</sup> James Sample, et al., *Justice at Stake, The New Politics of Judicial Elections 2000-2009* 1 (2010), available at [http://brennan.3cdn.net/d091dc911bd67ff73b\\_09m6yvpgv.pdf](http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf).

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 1.

being set in judicial races around the country. In 29 of the most expensive judicial elections between 2000 and 2009, the average non-super-spender donated \$850, while the top five super-spender in each election spent an average of nearly \$500,000.<sup>16</sup>

In the 2010 Michigan Supreme Court race, for instance, candidates raised and spent just over \$2.3 million, while special interest groups spent nearly \$6.8 million, mostly on television advertisements.<sup>17</sup> In fact, four of the top five spenders on television advertisements in 2010 were independent special interest groups.<sup>18</sup> The one candidate on that list, Illinois Justice Thomas Kilbride, spent heavily to defend his seat on the bench against an attack by independent groups.<sup>19</sup> By paving the way for unlimited corporate and union independent expenditures on these elections, *Citizens United* will only exacerbate the problem.

The 2011 Wisconsin Supreme Court race highlights the immense impact of this super-spending.

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<sup>16</sup> Sample, *supra* note 13, at 10.

<sup>17</sup> Charles Hall, ed., Justice at Stake, *The New Politics of Judicial Elections 2009-2010*, 5 (2011), available at <http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf>. See also *id.* at 4 n.2, 12 (noting that limitations on disclosure in Michigan hides many independent expenditures, and that some estimates indicate that spending may be higher).

<sup>18</sup> *Id.* at 16.

<sup>19</sup> *Id.* at 20.

Both candidates for the seat agreed to take public financing, limiting the amount they could spend on their respective campaigns to approximately \$400,000.<sup>20</sup> But various special interest groups spent \$3.5 million on independent expenditures and issue advertisements.<sup>21</sup> The result was one of the most partisan “nonpartisan” judicial races in recent history. The independent spending was all clearly directed at, and perceived by the public as, buying a vote in a very specific and politicized case.<sup>22</sup> The incumbent and eventual victor, Justice David Prosser, cast the tie-breaking vote in that case, consistent with the interests of the outside groups who paid for his re-election.<sup>23</sup>

Recently, the surge in independent judicial election spending moved squarely into retention elections, with special interest groups seeking to unseat judges that do not share their views.<sup>24</sup> The 2010 retention election in Iowa was particularly alarming. There, in an unprecedented move, out-of-state special interest groups purposefully poured money into a successful campaign to remove three justices who had

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<sup>20</sup> Press Release, Justice at Stake, *Nasty Campaign Deepens ‘Crisis’ for Wisconsin High Court* (Apr. 6, 2011), available at [http://www.justiceatstake.org/newsroom/press-releases-16824/?nasty\\_campaign\\_deepens\\_crisis\\_for\\_wisconsin\\_high\\_court&show=news&newaID=10401](http://www.justiceatstake.org/newsroom/press-releases-16824/?nasty_campaign_deepens_crisis_for_wisconsin_high_court&show=news&newaID=10401).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Patrick Marley and Don Walker, *Court Allows Union Limits*, *Milwaukee Journal Sentinel* (June 15, 2011, at A1).

<sup>24</sup> Hall, *supra* note 17, at 5.

joined a unanimous decision under the Iowa Constitution.<sup>26</sup> Groups involved in funding the campaign included the National Organization for Marriage, the American Family Association, the Family Research Council, the Campaign for Working Families, and petitioners' amicus in this case, Citizens United.<sup>28</sup> Fueled by almost \$1 million from these groups, television ads labeled the judges "activist" and accused them of "usurp[ing] the will of the voters."<sup>27</sup>

The justices, not wanting to politicize the courts or their decisions, did not campaign or raise money. At a forum, Chief Justice Marsha Ternus explained: "We [do] not want to contribute to the politicization of the judiciary here in Iowa and so we have not formed campaign committees and we have not engaged in fundraising."<sup>28</sup> In the end, the justices were each defeated by margins of roughly 55 percent to 45

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<sup>26</sup> The court ruled under the Equal Protection Clause of the Iowa Constitution that a class of Iowa families could not be denied equal rights. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) ("We have a constitutional duty to ensure equal protection of the law. Faithfulness to that duty requires us to hold Iowa's [Defense of Marriage Act] violates the Iowa Constitution. To decide otherwise would be an abdication of our constitutional duty.").

<sup>27</sup> Hall, *supra* note 17, at 8.

<sup>28</sup> *Id.* at 8-9.

<sup>29</sup> Josh Nelson, *Chief Justice: Don't Politicize Judicial System*, Waterloo-Cedar Falls Courier (Oct. 21, 2010), available at [http://wcfcourier.com/news/local/article\\_722dbfe9-90d1-5ab3-b37f-a5a7f988e9ee.html](http://wcfcourier.com/news/local/article_722dbfe9-90d1-5ab3-b37f-a5a7f988e9ee.html).

percent.<sup>28</sup> Bob Vander Plaats, spokesperson for the campaign against the judges, indicated that their goal was to send a message not just to Iowa's courts, but to courts across the country: "We have ended 2010 by sending a strong message for freedom to the Iowa Supreme Court and to the entire nation – that activist judges who seek to write their own law won't be tolerated any longer."<sup>29</sup>

After the campaign, current Chief Justice Mark Cady warned that it threatened to undermine Iowa's courts: "The fear I have, and that is growing in this state, is if we have another election where judges are removed because a decision is unpopular at the time it was made, then we'll have a politicized court system."<sup>31</sup> It goes without saying that these groups intend to sway judicial decision-making in a way that threatens the independence of our courts.

A dramatic increase in the proportion of television ads run by independent special interest groups has followed *Citizens United*. Independent groups sponsored just over 40 percent of the total television ads in 2010.<sup>32</sup> That is double the 20 percent sponsored by independent groups in 2006, before *Citizens United*

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<sup>28</sup> Hall, *supra* note 17, at 8.

<sup>29</sup> *Id.*

<sup>31</sup> Emily Schettler, *Iowa Chief Justice Visits Area*, Iowa City Press-Citizen (May 21, 2011, at A3).

<sup>32</sup> Sample, *supra* note 13, at 16.



was decided.<sup>33</sup> Overall, independent expenditures increased from 18 percent of total judicial campaign expenditures in 2005-06 to 30 percent in 2009-10.<sup>34</sup>

Along with this increase in independent spending has come a rapid deterioration of the tenor and tone of judicial races. Nearly 73 percent of the total ads run that attacked candidates in 2010 came from outside independent groups.<sup>35</sup> Candidates, while accounting for almost 60 percent of the total ads run, only accounted for 27 percent of the attack ads.<sup>36</sup>

In one example, the innocuous-sounding Illinois Civil Justice League spent \$688,000 on a campaign that included an advertisement against Justice Thomas Kilbride.<sup>37</sup> The ad featured actors, dressed in orange jumpsuits, posing as convicted criminals recounting the grisly details of their crimes.<sup>38</sup> It said Justice Kilbride had sided with them on appeal, voting against victims and law enforcement.<sup>39</sup> After *Citizens United*, independent ads like these, which are not

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<sup>33</sup> Jesse Rutledge, ed., *Justice at Stake, The New Politics of Judicial Elections 2006* 3 (2007), available at [http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006\\_D2A2449B77CDA.pdf](http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf).

<sup>34</sup> Hall, *supra* note 17, at 3.

<sup>35</sup> *Id.* at 16.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 20.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 16.

unusual, will only play a larger role in judicial elections across the country.

**B. The dramatic increase in judicial election spending has created the widespread appearance that justice is for sale.**

As the tide of money has risen in judicial elections, so, too, have public perceptions that outsized spending affects judicial decision-making. Recent data repeatedly show that the public has deep concerns that judicial outcomes are, in fact, influenced by campaign contributions:<sup>40</sup>

- A 2011 national survey found that 83% worry campaign contributions influenced judges' decisions. A mere 3% believe they had no influence.<sup>41</sup>
- A 2010 national survey found that 71% worry campaign contributions influenced judges'

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<sup>40</sup> Members of the public generally do not distinguish between direct contributions and independent expenditures in favor of a judge or against the judge's opponent. *Cf. Caperton*, 129 S. Ct. at 2256-57.

<sup>41</sup> 20/20 Insight LLC, *National Registered Voter Survey*, Oct. 10-11, 2011, at 2, available at [http://www.justiceatstake.org/media/cms/NPJE2011poll\\_7FE4917006019.pdf](http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf).

decisions. Only 9% believe they had no influence.<sup>43</sup>

Data from several recent surveys in states that hold judicial elections confirm these concerns:

- A 2012 poll in Minnesota showed that only 9% believe campaign contributions do not influence judges' decisions. Meanwhile, 65%, up from 59% in 2008, worried that they have some influence.<sup>43</sup>
- A 2010 poll in West Virginia showed that only 5% believe campaign contributions do not influence judges' decisions. Meanwhile, 78% worried that they have some influence.<sup>44</sup>

In addition to these polls, in Wisconsin, in the wake of the 2011 supreme court race dominated by special interests, a poll showed that 88% are concerned that rising judicial election spending and

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<sup>43</sup> *The Harris Poll National Quorum Justice at Stake Campaign*, June 9-13, 2010, at 1, available at [http://www.justiceatstake.org/media/cms/The\\_Harris\\_Poll\\_National\\_Quorum\\_Jus\\_F847FF6BF6CD0.pdf](http://www.justiceatstake.org/media/cms/The_Harris_Poll_National_Quorum_Jus_F847FF6BF6CD0.pdf).

<sup>43</sup> The Tarrance Group, Inc., *Minnesota Statewide Registered Voter Survey*, May 1-2, 2012, at 5, available at [http://www.justiceatstake.org/media/cms/MN\\_Statewide\\_Justice\\_Survey\\_170811AFB695E.pdf](http://www.justiceatstake.org/media/cms/MN_Statewide_Justice_Survey_170811AFB695E.pdf); Decision Resources, Ltd., *Justice at Stake Study Minnesota Statewide*, Jan. 2008, at 5, available at [http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey\\_717C253F67D9B.pdf](http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey_717C253F67D9B.pdf).

<sup>44</sup> Anzalone Liszt Research, Inc., *Justice at Stake West Virginia 2010 Poll*, Feb. 21-24, 2010, at 2, available at [http://www.justiceatstake.org/media/cms/West\\_Virginia\\_Poll\\_Results\\_674E634FDB13F.pdf](http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf).

nasty campaign tactics are compromising the fairness of Wisconsin's courts.<sup>46</sup>

Taken together, these results demonstrate that the public *perceives* campaign cash to affect judicial decisions. This growing belief that justice is for sale undermines public confidence in the courts and diminishes the integrity of all judicial decisions.<sup>47</sup> The erosion of public confidence in the judiciary is more than an academic issue; it reflects a fundamental concern with the ongoing viability of the judicial system as we know it.

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<sup>46</sup> 20/20 Insight LLC, *Wisconsin Registered Voter Survey*, July 18-20, 2011, at 3, available at [http://www.justiceatstake.org/media/cms/WI\\_Merit\\_Poll\\_Results\\_734DCFE0AA5C8.pdf](http://www.justiceatstake.org/media/cms/WI_Merit_Poll_Results_734DCFE0AA5C8.pdf).

<sup>47</sup> Even James Bopp, Jr., counsel for the Petitioners in this case and a frequent critic of campaign finance reform, has noted that "[b]ecause courts have neither the power to levy taxes nor to command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice, rather than mere political actors." James Bopp, Jr. and Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 *Den. U.L. Rev.* 195, 198 (2008); see also Paul J. Nyden, *Mining Appeal Moving Along: Olson to Argue Harman Case Against Massey Before Supreme Court*, *Charleston Gazette*, May 16, 2008 (quoting Citizens United's counsel, Theodore Olson, as saying that the "improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today").

**II. The States' ability to regulate judicial election spending must be decided within the balance of competing constitutional rights of free speech and due process.**

The free speech rights of the Petitioners must be balanced against the due process rights of litigants before the courts, both of which are constitutionally protected. "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."<sup>47</sup> "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."<sup>48</sup> Accordingly, the due process rights of litigants should be given at least equal weight when balancing these competing rights.<sup>49</sup> Without a fair trial before an independent tribunal, no other constitutional right can be vindicated.

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'<sup>50</sup> "Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances would offer a possible temptation to the average . . . judge to . . . lead him not to hold the

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<sup>47</sup> *Bridges v. California*, 314 U.S. 252, 260 (1941).

<sup>48</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

<sup>49</sup> See *In re Independent Pub. Co.*, 240 F. 849, 862 (9th Cir. 1917).

<sup>50</sup> *Caperton*, 129 S. Ct. at 2259 (internal citations omitted).



balance nice, clear and true."<sup>61</sup> In determining whether due process concerns have been met, the Court must ask whether, "under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."<sup>62</sup>

The scope of the free speech right possessed by the Petitioners is addressed by the parties and will not be reiterated here. Suffice to say, the competing interests cannot be ignored, and must be balanced within the context of a compelling state interest in maintaining judicial integrity.

### **III. The States have a compelling state interest in maintaining the integrity and independence of their judiciaries.**

Maintaining judicial integrity is a state interest of the "highest order":

Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity.

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<sup>61</sup> *Caperton*, 129 S. Ct. at 2264.

<sup>62</sup> *Id.* at 2263.

Judicial integrity is, in consequence, a state interest of the highest order.<sup>63</sup>

Preserving that integrity requires not only that litigants receive their constitutional due process before a neutral decision-maker,<sup>64</sup> but also, as the Montana Supreme Court emphasized in the decision under review, that the public continues to place its confidence in state judiciaries.<sup>65</sup>

The people of the State of Montana have a continuing and compelling interest in, and a constitutional right to, an independent, fair and impartial judiciary. The State has a concomitant interest in preserving the appearance of judicial propriety and independence so as to maintain the public's trust and confidence. In the present case, the free speech rights of the corporations are no more important than the due process rights of litigants in Montana courts to a fair and independent judiciary, and both are constitutionally protected. The Bill of Rights does not assign priorities as among the rights it guarantees.<sup>66</sup>

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<sup>63</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring); *Caperton*, 129 S. Ct. at 2266-67.

<sup>64</sup> See *Caperton*, 129 S. Ct. at 2259.

<sup>65</sup> *Western Tradition Partnership*, ¶40 (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. at 561).

<sup>66</sup> *Id.*

This Court has recognized “[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”<sup>67</sup> That reputation depends upon the absence of not only actual bias, but, also, *perceived* bias. “[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.”<sup>68</sup> No such obligation is, of course, placed on the executive or legislative branches of government, which are expected to be representative of their individual constituents.

Historically, bias or “favoritism” has been perfectly acceptable in – if not a defining feature of – the “representative politics” of the other branches of government.<sup>69</sup> This Court explained in *Citizens United* that the “appearance of influence or access” occasioned by independent (corporate) expenditures “will not cause the electorate to lose faith in our democracy.”<sup>70</sup> This Court’s findings in *Caperton* raise serious questions about this assertion from *Citizens United*

<sup>67</sup> *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

<sup>68</sup> *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968); see *White*, 536 U.S. at 789 (O’Connor, J., concurring) (emphasizing the importance of the state interest in maintaining “the public’s confidence in the judiciary”).

<sup>69</sup> *Citizens United*, 130 S. Ct. at 910 (citing *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003) (Kennedy, J., concurring)); see also *Nevada Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2349 (2011) (noting the differences between a legislator’s vote and a judge’s decision).

<sup>70</sup> *Citizens United*, 130 S. Ct. at 910.

as it relates to the judiciary. However, even assuming this to be true, the same cannot be said with respect to such expenditures in state judicial elections. In states where spending has soared, the appearance of influence and access has caused the electorate to lose faith in our judiciary, thereby impacting its effective functioning.

*Citizens United* specifically recognized that a narrow ban on political speech is appropriate when a particular governmental function cannot operate effectively absent the ban:

The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.<sup>61</sup>

These *Amici* respectfully submit the effective functioning of the judiciary is adversely impacted by unlimited corporate independent expenditures in judicial elections. Judicial elections properly fall within this narrow category wherein the political speech of corporations may be narrowly restricted to allow the judiciary to perform properly. Judicial independence is certainly as important a governmental function as public education, the corrections system, and the military.<sup>62</sup>

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<sup>61</sup> *Citizens United*, 130 S. Ct. at 899.

<sup>62</sup> *Id.*

**IV. Individual “Caperton” motions will not vindicate the States’ compelling state interest in maintaining the integrity of the judiciaries, nor protect litigants’ due process rights.**

The Petitioner in *Citizens United* has filed an *amicus curiae* brief arguing against the Montana Supreme Court’s position that the regulation of corporate campaign expenditures “is necessary to ensure that elected judges are not biased in favor of campaign supporters.”<sup>43</sup> Judicial bias is appropriately addressed, according to *Citizens United*, through “Caperton” recusal motions in individual cases.

That is neither true nor does it address the argument made in this brief. It is not true because, as four Justices of this Court have noted, so-called *Caperton* motions will “catch” only the “worst abuses.”<sup>44</sup> Many instances of bias resulting from campaign support will go undetected because, as persuasively argued by the *amicus* brief filed in *Caperton* by 27 retired state supreme court justices, it is often difficult for judges to identify – let alone admit to – bias in their own decisions.<sup>45</sup> Researchers have noted even judges who believe themselves to be fair and unbiased may, in

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<sup>43</sup> Brief of *Citizens United* as *Amicus Curiae* in Support of Petitioners 9 (citing App. 30a ¶44).

<sup>44</sup> *Citizens United*, 130 S. Ct. at 968 (Stevens, J., joined by Ginsburg, Breyer, & Sotomayor, JJ., dissenting).

<sup>45</sup> *Caperton*, Brief *Amicus Curiae* of 27 Former Chief Justices and Justices in Support of Petitioner, p. 7 (citing Lord MacMillan, *Law and Other Things* 217-18 (1937)).



fact, harbor unrecognized prejudices that manifest themselves in their judicial decisions.<sup>66</sup>

But whether or not *Caperton* motions are adequate to eliminate actual bias in decision-making is ultimately beside the point. The fact remains they will almost certainly do nothing to address the public perception that spending in judicial campaigns has resulted in systemic bias in state courts. Only through narrowly tailored regulations like Montana's can states address the public's perception of the integrity of their courts.

Finally, as a practical matter it is currently all but impossible for judges to determine whether individual litigants have contributed to independent expenditure campaigns due to the ability of special interests to use several layers of shell corporations to launder money and hide their election spending. Even in this case, Western Tradition Partnership bragged to its potential donors their identity would not be disclosed.<sup>67</sup>

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<sup>66</sup> See, e.g., Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1248-50, n.176-84 (2002).

<sup>67</sup> *Western Tradition Partnership*, ¶7 (Western Tradition Partnership does not dispute "that its purpose is to act as a conduit of funds for persons and entities including corporations who want to spend money *anonymously* to influence Montana elections. WTP seeks to make unlimited expenditures in Montana elections from these *anonymous* funding sources.") (emphasis added).

The behavior of the Michigan Chamber of Commerce in 2010 helps illustrate what Western Tradition Partnership likely intended to do. The Michigan Chamber gave \$5.4 million to a national PAC operated by the Republican Governors Association, which then sent \$8.4 million to its state affiliate in Michigan.<sup>68</sup> The state affiliate sent \$3 million to Texas for Governor Rick Perry's re-election campaign, and \$5.2 million to the Michigan Republican Party, closely approximating the original \$5.4 million donated by the Michigan Chamber.<sup>69</sup> The Michigan Republican Party then made \$4.8 million in independent expenditures on the 2010 Michigan Supreme Court race.<sup>70</sup> These labyrinthine transactions are not catalogued on a single disclosure form or website, but were put together through the heroic work of the Michigan Campaign Finance Network.<sup>71</sup>

In the wake of *Citizens United*, stories like these will only become more common. Following the money is no task easily and timely achievable by litigants, thereby defeating the ability to even bring a *Caperton* motion.

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<sup>68</sup> Hall, *supra* note 17, at 12.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See generally Rich Robinson, *\$70 Million Hidden in Plain View: Michigan's Spectacular Failure of Campaign Finance Disclosure, 2000-2010* (June 2011), available at [http://www.mcfn.org/pdfs/reports/MICFN\\_HiddenInPlainViewP-rev.pdf](http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf).

## CONCLUSION

Preserving an independent, fair and impartial judiciary, as well as avoiding the appearance of impropriety, is a compelling state interest of the "highest order." The constitutional right to due process is fundamental, and in the context of campaign finance laws, must be balanced against free speech. The constitutional tension between these countervailing rights cannot be denied, and cannot be ignored.

For the foregoing reasons, the petition for a writ of certiorari should be denied. If the Court grants the petition, it should set the case down for oral argument rather than summarily reverse the decision of the Montana Supreme Court.

Respectfully submitted,

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May 17, 2012

# **REPLY BRIEF**

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In The  
**Supreme Court of the United States**

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**American Tradition Partnership, Inc., f.k.a.  
Western Tradition Partnership, Inc., et al.,**  
*Petitioners*

v.

**Steve Bullock, Attorney General of Montana  
et al., Respondents**

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On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Montana

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**Reply Brief**

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## Table of Contents

Reasons to Grant Certiorari.....	1
I. The Decision Below Conflicts with the Holding of <i>Citizens United</i> ..	1
II. The Decision Below Conflicts with the Reasoning of <i>Citizens United</i> ..	7
III. The Decision Below Creates Splits with Federal Circuit Courts.....	10
IV. This Case Presents an Important Federal Question that Should Be Decided Sum- marily.....	11
Conclusion.....	13

## Table of Authorities

### *Cases*

<i>Austin v. Michigan Chamber of Commerce</i> , 494 U.S. 652 (1990).....	5
<i>Bluman v. FEC</i> , 800 F. Supp. 2d 281 (D.D.C. 2011).....	2
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	1-2, 4-5
<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010) .....	<i>passim</i>
<i>FEC v. Massachusetts Citizens for Life</i> , 479 U.S. 238 (1986).....	10
<i>FEC v. National Conservative PAC</i> , 470 U.S. 480 (1985).....	6
<i>FEC v. Wisconsin Right to Life</i> , 551 U.S. 449 (2007). ....	11
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978).....	1, 5
<i>Holder v. Humanitarian Law Project</i> , 130 S. Ct. 2705 (2010).....	2
<i>Montana Chamber of Commerce v. Argenbright</i> , 266 F.3d 1049 (9th Cir. 2000). . .	9

<b><i>Constitutions, Statutes, Regulations &amp; Rules</i></b>	
2 U.S.C. § 433(a) . . . . .	8
2 U.S.C. § 441b(b)(2) . . . . .	8
11 C.F.R. § 109.21 . . . . .	6
U.S. Const. amend. I . . . . .	<i>passim</i>

***Other Authorities***

Robert Barnes, <i>Supreme Court faces pressure to reconsider Citizens United ruling</i> , Washington Post, May 20, 2012 . . . . .	12
Charles S. Johnson, <i>Schweitzer signs initiative opposing corporate donations</i> , Billings Gazette, May 3, 2012. . . . .	7, 12
Raymond J. La Raja & Brian F. Schaffner, <i>The (Non-)Effects of Campaign Finance Spending Bans on Macro Political Outcomes: Evidence From the States</i> . . . . .	4

# Reasons to Grant Certiorari

## I.

### The Decision Below Conflicts with the Holding of *Citizens United*.

This Court held that government may not suppress speech based on corporate identity:

We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

*Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

But Respondents ("Montana") insist that Montana may suppress political speech based on corporate identity. See, e.g., Opp'n 1 (Ban text), 8 ("The Montana Supreme Court applied rather defied *Citizens United*.").

This Court held that (a) no antidistortion risk justifies banning corporate speech, *Citizens United*, 130 S. Ct. at 913, (b) the only cognizable interest for restricting core political activity is quid-pro-quo corruption, *id.* at 909-10, and (c) "[t]he absence of . . . coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* . . .," *id.* at 909

(quoting *Buckley*, 424 U.S. at 47).<sup>1</sup>

But the Montana Supreme Court *relied* on the antidistortion interest and held that independent expenditures *do* pose a corruption risk. Pet. 7-19. And Montana defends and continues that unconstitutional action. Opp'n 19-34.

This Court held that, whatever problems government may perceive, it "may not choose an unconstitutional remedy." *Id.* at 911. "An outright ban on corporate political speech during the critical pre-election period is not a permissible remedy." *Id.*

But Montana and its amici recite numerous perceived problems that they insist justify the impermissible remedy of suppressing corporate political speech. If a problem is real,<sup>2</sup> government may seek to

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<sup>1</sup> The Court in *Citizens United* was not dealing with foreign nationals (as to which it expressly did not rule, *id.* at 911, nor terrorists, so that decision is not inconsistent with either *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *affirmed*, No. 11-275 (Jan. 9, 2012), or *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). Rather, *Citizens United* was dealing with non-foreign, non-terrorist entities and stated a general rule accordingly. While Montana repeatedly refers to "foreign" corporations, meaning corporations from other states, see Opp'n 2, 7, 9, 16, 19-20, 22, the State by such subliminal recitals cannot justify banning corporate independent expenditures on the basis that corporations from other states might speak in Montana.

<sup>2</sup> More spending for increased political speech is not a cognizable problem, and if coordination rules are perceived as inadequate, the permissible remedy is to try to fix those, not to ban core political speech. See Pet. 30-31.



remedy it, but not with an impermissible remedy.

In opposing certiorari, Montana needed to show that this Court did *not* say that speech may not be banned based on corporate identity, that this Court did *not* reject the antidistortion interest, that independent expenditures *operate differently* in Montana, and that suppressing corporate political speech is a permissible remedy. Unsurprisingly, Montana fails.

Montana ignores these central, controlling holdings. It even fails to mention the arguments of the dissenters below—who highlighted the failure to follow these controlling holdings, App. 33-93a—except to cite a dissenter’s statement, Opp’n 27 (citing App. 90a), that the dissenter acknowledged was *inconsistent* with *Citizens United*, see App. 87a (“While, . . . I am bound to follow *Citizens United*, I do not have to agree with [it].”).

Montana and its amici try to divert attention away from these controlling holdings. For example, Montana turns from the proper constitutional issues to unwarranted slurs on Petitioner ATP. See Opp’n 5, 16-17, 20, 27, 30, 32-34.<sup>3</sup> This is the logical fallacy *argumentum ad hominem*, irrelevant to the real issues here.<sup>4</sup> And if there is any perceived problem

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<sup>3</sup> These are unwarranted as explained in Petitioners’ Application for Stay. *Id.* at 32-39 (Montana fails to employ this Court’s magic-word “express advocacy” test to define independent expenditures and this Court’s “major purpose” test for determining “political committee” status).

<sup>4</sup> The trial court rejected this argument, App. 103a: The State . . . attempts to portray WTP as an unsavory entity up to no good. That may or may not be

with ATP *legally* offering donors anonymity (because it is not properly a “political committee” under this Court’s “major purpose” test for PAC status, *Buckley*, 424 U.S. at 79), Montana may not impose an unconstitutional remedy.

Several amici attempt the diversion of relying on events *since* the Montana Supreme Court’s decision to justify that decision. See, e.g., Br. Amici Curiae Brennan Ctr. et al. But events since that court’s decision are not part of the record of this case and played no role in that court’s decision. These amici essentially want this Court to host a trial, to allow creation of a new record, and to rely on new arguments not considered below or even asserted by *Montana*.<sup>8</sup>

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the case, but it is clear to this Court that Section 227 applies to WTP. Whatever one might think of WTP, this Court does not have the power to take away its First Amendment right to support or oppose political candidates of its choice.

<sup>8</sup> For example, some amici urge reconsideration of *Citizens United*, see, e.g., Br. Amici Curiae Free Speech for People et al., but *Montana* says that “[t]here is no need to read [*Citizens United*] so broadly, and therefore no need to reconsider it in light of the . . . distinctions between the federal and Montana laws.” Opp’n 35. Because *Montana* neither calls for reconsideration nor makes a case for it, reconsideration is not at issue. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and in judgment) (“Whether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here . . . .”). Moreover, the doomsday portrayals by amici are overblown. See, e.g., Raymond J. La Raja & Brian F. Schaffner, *The (Non-)Effects of Campaign Finance Spending Bans on Macro Political Outcomes: Evi-*

That is not this Court's role.

Such diversions fail because they do not overcome this Court's holdings that political speech may not be rejected based on corporate identity, no anti-distortion interest is cognizable, independent expenditures pose no quid-pro-quo-corruption risk, and government may not choose unconstitutional remedies.

These holdings received substantial briefing, with specific rebriefing on whether to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and are constitutionally sound. For example, the holding that independent expenditures pose no quid-pro-quo-corruption risk because of their independence goes back to *Buckley*. See *Citizens United*, 130 S. Ct. at 909 (quoting *Buckley*, 424 U.S. at 47). Petitioners argue that this holding was made as a matter of law. Pet. 15-17. Montana disputes this. Opp'n 18. But this Court noted that it was closing a factual-analysis door that some perceived to be open:

A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. 435 U.S., at 788, n. 26. *For the reasons explained above*, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.

*Citizens United*, 130 S. Ct. at 909 (emphasis added). "For the reasons explained above" referenced the preceding legal arguments in Part III(B)(2), *id.* at 908, which discussed *Buckley*'s statement that the

independence of independent expenditures eliminated the quid-pro-quo risk, and which discussed no facts. This legal conclusion applies to all independent expenditure by all corporations. It closed the door on possible factual considerations and covers all independent expenditures as a matter of law.

That this is true is clear from the definitions of "corruption" and "coordination." First, "corruption" is limited to quid-pro-quo corruption, i.e., "dollars for political favors." *Id.* at 909 (*quoting FEC v. National Conservative PAC*, 470 U.S. 480, 498 (1985)). Second, this exchange of a campaign contribution for a promise of a vote can only arise in the context of a conversation about the independent expenditure or the candidate's needs and plans, as the "coordinated communication" definition makes clear. See 11 C.F.R. § 109.21 ("communication is coordinated" if it meets specific "content" and "conduct" requirements). This is critical for two reasons. First, the conversation insures that the independent expenditure is beneficial to the candidate. Independent expenditures without such a conversation might not benefit a candidate. Second, the conversation provides a context in which an explicit or implicit promise can be made. Without the conversation, the link is broken. Furthermore, since this is a prophylactic measure, the court needs to consider the effect of the adoption of the counter viewpoint, which would be devastating to free speech and citizens' involvement in our democratic Republic. Under that viewpoint, anything and everything that one does that might influence an election would need to be analyzed to see if it benefitted a candidate's election. If it does, it is subject to contribution

limits. Citizens' involvement in our democracy would then be limited by contribution limits. Furthermore, that means that absolutely everything that influences an election could be limited. This is actually an expenditure limit in the guise of a contribution limit. All of this Court's holdings that expenditures cannot be limited would be circumvented.

In sum, the Montana Supreme Court and Montana, in its Opposition, have failed to follow these controlling holdings of *Citizens United*.<sup>6</sup>

## II.

### The Decision Below Conflicts with the Reasoning of *Citizens United*.

Montana insists that its Ban on corporate independent expenditures is not really a ban because corporations can make independent expenditures through a separate segregated fund that they can administer. Opp'n 11-12. Montana misunderstands *Citizens United*, which held such a fund requirement impermissible. As this Court explained, under the federal ban corporations could make independent expenditures only by

establish[ing] . . . a "separate segregated fund"

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<sup>6</sup> Montana Governor Brian Schweitzer is reported to have signed Montana initiative, I-166, to "boost a national effort to overturn [*Citizens United*]" by stating that corporations are not people and lack constitutional rights. Charles S. Johnson, *Schweitzer signs initiative opposing corporate donations*, Billings Gazette, May 3, 2012, [http://billingsgazette.com/news/state-and-regional/montana/schweitzer-signs-initiative-opposing-corporate-donations/article\\_5181dd8f-91c4-5b42-b3bc-b17d2c57281b.html](http://billingsgazette.com/news/state-and-regional/montana/schweitzer-signs-initiative-opposing-corporate-donations/article_5181dd8f-91c4-5b42-b3bc-b17d2c57281b.html).



(known as a political action committee, or PAC) . . . . 2 U.S.C. § 441b(b)(2). The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Ibid.*

130 S. Ct. at 888-89 (emphasis added). The federal ban barred using "general treasury funds to make . . . independent expenditures." *Id.* at 887. This Court held that corporations are free to use general-treasury funds for independent expenditures. *Id.* at 911.

Since Montana imposes a similar separate-segregated-fund ("SSF") requirement (also with source restrictions), instead of allowing corporate independent expenditures from general-treasury funds, Montana's Ban imposes the same sort of PAC that this Court held (a) is a separate legal entity, (b) does not allow a corporation itself to speak, and (c) constitutes a ban. *Id.* at 897-98. Montana's recital of how Montana's scheme works does nothing to prove its assertion that "it is, at best, empty formalism to regard the political committee designation as a 'separate legal entity.'" Opp'n 13. Montana's SSF (a PAC) is a separate legal entity just as the federal SSF was deemed to be so in *Citizens United*. Petitioners do not "misunderstand[] Montana law," Opp'n 13; Montana misunderstands *Citizens United*.

Montana says Montana PACs have up to 5 days to establish an SSF after qualifying, while federal SSFs must be established before speaking. Opp'n 15. But federal PACs must register *10 days* after qualifying as PACs. 2 U.S.C. § 433(a). So both effectively

require registration before doing much speech, a type of prior restraint.

Montana argues that it is easy to become a PAC in Montana by filing a form. Opp'n 13. It is also easy to become a federal PAC by filing a form. But for a corporation to be unable to use non-source-restricted money from its general fund is an onerous burden under either Montana's Ban or the now-overturned federal ban on corporate independent expenditures. And imposed PAC-status is a cognizable constitutional burden as a matter of law. See *Citizens United*, 130 S. Ct. at 897; *Montana Chamber of Commerce v. Argenbright*, 266 F.3d 1049, 1057 (9th Cir. 2000) ("There is no question that a law requiring corporations to make independent expenditures (even for candidates) through a segregated fund burdens corporate expression.").

Given this burden, the Montana Supreme Court was required to apply this Court's First Amendment strict scrutiny. Montana claims that "Petitioners concede that the decision below acknowledged the proper levels of scrutiny." Opp'n 11. This is surprising because the Court only "acknowledged" strict scrutiny as applicable to *one* of the three corporate plaintiffs and because the caption of Petitioners' recited discussion states that "the state court *rejected* this Court's holding that strict scrutiny applies to the corporate ban." Pet. 12 (emphasis added; caps altered). The Montana Supreme Court actually applied intermediate scrutiny to MSSA and Champion Painting, even though they could not speak *as corporations*. App. 31a. And though the court claimed to apply strict scrutiny to ATP, its scrutiny was com-

plaisant because it claimed that ATP could speak through a PAC (contrary to *Citizens United*, *supra*), App. 32a, and that Montana had interests (essentially forbidden anti-distortion interests) justifying its Ban. Pet. 12-13.

In sum, the Montana Supreme Court and Montana in its Opposition have failed to follow the controlling analysis of *Citizens United*.

### III.

#### The Decision Below Creates Splits with Federal Circuit Courts.

Petitioners established that the decision below creates splits with federal circuit courts. Pet. 19-20. Montana argues that there is no real circuit split because it exempts *MCFL*-type corporations<sup>7</sup> from its corporate-independent-expenditure Ban. Opp'n 33. Complying with *MCFL* neither provides narrow tailoring, Opp'n 32-33, nor eliminates circuit splits.

This Court, in *Citizens United*, and the courts Petitioners cite, Pet. 19-20, did not rely on any distinction between *MCFL*-type corporations and business corporations, as Montana asserts. Opp'n 33. That some of the cases had nonprofit plaintiffs does not mean that they were *MCFL*-type corporations in any event. For example, Montana cites *Wisconsin Right to Life State PAC v. Barland*, 664 F.3d 139 (7th Cir. 2011), as involving a nonprofit's member-

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<sup>7</sup> In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court created an exception to the federal ban for nonprofit, ideological, nonstock corporations that receive no corporate contributions. *Id.* at 263-64.

ship fund. Opp'n 33. But a PAC is not an *MCFL*-type corporation, and Wisconsin Right to Life is not an *MCFL*-type corporation because it receives corporate contributions. See *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 458 (2007) (WRTL was a "nonprofit, nonstock, ideological advocacy corporation" but not within the *MCFL* exception).<sup>8</sup>

In sum, Montana has failed to show that the decision below did not create splits with federal circuits on the controlling holdings of *Citizens United*.

#### IV.

**This Case Presents an Important Federal Question that Should Be Decided Summarily.**

The immense pressure to overturn this Court's resolution of a divisive controversy in *Citizens United*, raises the standard for overturning that precedent and counsels summary reversal. Pet. 24. The outpouring of amici briefs for Montana and overruling *Citizens United* increases this pressure and the need for summary reversal.

This is also true of other attacks on *Citizens United*. For example, fifty organizations sent a letter to Congress seeking hearings on a constitutional amendment overturning *Citizens United* (available at <http://www.pfaw.org/issues/on-capitol-hill/letters/Hold-House-hearings-on-amending-the-Constitution->

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<sup>8</sup> Moreover, though Montana tries to establish that MSSA is an *MCFL*-type corporation (and thus unburdened by the Ban), Opp'n 14, 33, this is not so, as the dissent showed, App. 62-66a, and it need not be decided in any event because other Petitioners have standing.

to-remedy-Citizens-United). The Senate Judiciary Committee is reportedly planning hearings on overturning *Citizens United*. See <http://www.pfaw.org/print/39916>. And the *Washington Post* reports the mounting pressure on this Court. See Robert Barnes, *Supreme Court faces pressure to reconsider Citizens United ruling*, *Washington Post*, May 20, 2012, [http://www.washingtonpost.com/politics/supreme-court-faces-pressure-to-reconsider-citizens-united-ruling/2012/05/20/gIQA0doqdU\\_story.html](http://www.washingtonpost.com/politics/supreme-court-faces-pressure-to-reconsider-citizens-united-ruling/2012/05/20/gIQA0doqdU_story.html). See also *supra* note 6 (Montana Governor signed anti-*Citizens United* initiative).

Montana argues that this case “is ill-suited to summary reversal given the lack of a record establishing any substantial burden on Petitioners’ free speech rights.” Opp’n 34. But Montana is simply wrong that requiring corporations to speak through an SSF (PAC) is not a substantial burden. See *supra* at 7-9. And despite Montana’s obfuscation efforts, it has failed its burden of justifying Montana’s Ban on the use of corporate general funds for independent expenditures, which Ban prevents Petitioners from making independent expenditures *as corporations*. Montana has simply refused to follow the central, controlling holdings and rationale of *Citizens United*. That sort of failure to abide by this Court’s holdings and constitutional duty should not be rewarded with plenary review.

In sum, this case is best decided by granting certiorari and summarily reversing the decision below.



## **Conclusion**

For the reasons stated, the Court should grant certiorari.

Respectfully submitted,

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**May 29, 2012**

**AMICUS  
CURIAE  
BRIEF**

**In The  
Supreme Court of the United States**

AMERICAN TRADITION PARTNERSHIP, INC., *et al.*,  
*Petitioners,*

v.

STEVE BULLOCK, Attorney General of Montana, *et al.*,  
*Respondents.*

**On Petition For A Writ Of Certiorari To The  
Supreme Court Of The State Of Montana**

**BRIEF AMICI CURIAE OF AARP, CAMPAIGN  
LEGAL CENTER, CENTER FOR RESPONSIVE  
POLITICS, CHICAGO LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS UNDER LAW, CITIZENS FOR  
RESPONSIBILITY AND ETHICS IN WASHINGTON,  
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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT.....	4
I. Undisclosed Corporate Money In Elections Gives Rise To Corruption And The Appearance Of Corruption .....	4
A. Current Law's Accommodation Of Close Relationships Between Candidates And So-Called "Independent" Spenders Gives Rise To Corruption And The Appearance Of Corruption.....	5
B. The Absence Of Effective Disclosure Of Corporate Money In Elections Gives Rise To Corruption And The Appearance Of Corruption.....	9
II. Corporations Spending Money In Candidate Elections Deny Shareholders And Citizens The Information Needed To Hold Corporations And Elected Officials Accountable And Make Informed Decisions On Election Day .....	12
A. Corporations Have Clear Incentives To Avoid Disclosure And Accountability – Target As "Exhibit A" .....	13
B. Federal Tax Laws Accommodate Corporate Anonymity .....	15

TABLE OF CONTENTS – Continued

	Page
C. Federal Campaign Finance Laws Accommodate Corporate Anonymity .....	18
D. States' Campaign Finance Laws Accommodate Corporate Anonymity .....	20
E. More Than \$120 Million In Anonymous Funds Was Spent To Influence 2010 Elections, With Far Greater Spending Predicted For 2012 .....	24
III. Data That Is Disclosed Is Neither Timely Enough, Nor Accessible Enough, To Enable The Electorate To Make Informed Decisions On Election Day.....	29
CONCLUSION .....	31
 APPENDIX	
Description of <i>Amici Curiae</i> .....	App. 1



## TABLE OF AUTHORITIES

	Page
CASES:	
<i>Am. Tradition P'ship v. Bullock</i> , 132 S. Ct. 1307 (2012).....	4
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	<i>passim</i>
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STATUTES AND LEGISLATION:	
2 U.S.C. § 434(c)(2)(C) .....	19
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26 U.S.C. § 501(c)(5) .....	17
26 U.S.C. § 501(c)(6) .....	17, 24
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## TABLE OF AUTHORITIES – Continued

	Page
11 C.F.R. § 109.10(e)(1)(vi) .....	19
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26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii) .....	16
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Mont. Code Ann. § 13-1-101(c)(a)(i) .....	23
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	Page
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	Page
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	Page
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Page

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

This *amici curiae* brief is filed on behalf of 14 nonprofit, nonpartisan organizations that support effective campaign finance disclosure laws to ensure transparency and protect the integrity of government.<sup>2</sup>

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## SUMMARY OF ARGUMENT

In *Citizens United v. FEC*, this Court invalidated a longstanding federal law prohibition on corporate independent expenditures, concluding that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” 130 S. Ct. 876, 909, 913 (2010). The Court seemingly based its conclusion on at least two faulty assumptions. First, the Court assumed that so-called “independent” expenditures as defined in law require “[t]he absence of prearrangement and coordination” and, therefore, do not

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<sup>1</sup> Pursuant to Rule 37.6, counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief.

Letters consenting to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

<sup>2</sup> A description of *amici curiae* is attached as an Appendix.

present the “danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” *Id.* at 908 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (*per curiam*)). Second, the Court assumed that current disclosure laws would provide “citizens with the information needed” to “see whether elected officials are ‘in the pocket’ of so-called moneyed interests.” *Id.* at 916 (quoting *McConnell v. FEC*, 540 U.S. 93, 259 (2003) (opinion of Scalia, J.)).

These assumptions are contrary to experience since *Citizens United*. First, the law accommodates close relationships between so-called “independent” spenders and candidates and the resulting expenditures do give rise to corruption and the appearance of corruption. Second, citizens do not have the “information needed” to “see whether elected officials are ‘in the pocket’ of so-called moneyed interests.” *Id.* The Court has long recognized that “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” *Buckley*, 424 U.S. at 67. The inevitable corollary is that undisclosed money in politics gives rise to corruption and the appearance of corruption.

Part I of *amici*’s argument details how current law accommodates close relationships between candidates and so-called “independent” spenders and how – particularly in the absence of effective disclosure – corporate funds used for so-called “independent”

expenditures could lead to corruption and the appearance of corruption.

Part II explains how more than \$120 million in anonymous-source funds was spent to influence the 2010 elections, with far greater spending of anonymous funds projected for 2012. Specifically, Part II details how tax and campaign finance laws facilitate corporations' predictable desire to deny citizens the information needed to hold corporations and elected officials accountable and make informed decisions on Election Day.

Finally, Part III makes clear that even when campaign finance data is disclosed, the data too often is neither timely enough, nor accessible enough, to enable the electorate to make informed decisions on Election Day.

For these reasons, *amici* respectfully urge the Court to deny *certiorari* and leave standing Montana's law. If, however, the Court grants *certiorari*, the Court should grant plenary review, reconsider its holding in *Citizens United* that independent expenditures do not give rise to corruption or the appearance of corruption, and affirm the judgment of the Supreme Court of Montana.

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## ARGUMENT

### I. Undisclosed Corporate Money In Elections Gives Rise To Corruption And The Appearance Of Corruption.

In *Citizens United*, this Court concluded that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” 130 S. Ct. at 909. In a statement accompanying the Court’s order staying this case, Justice Ginsburg, joined by Justice Breyer, called into question this holding:

Montana’s experience, and experience elsewhere since this Court’s decision in *Citizens United* . . . make it exceedingly difficult to maintain that independent expenditures by corporations “do not give rise to corruption or the appearance of corruption.”

*Am. Tradition P’ship v. Bullock*, 132 S. Ct. 1307, 1307-08 (2012) (order granting stay) (internal citations omitted).

*Amici* respectfully submit that it is *impossible* to maintain that independent expenditures can never be corruptive. Existing law accommodates close relationships between so-called “independent” spenders and candidates, which gives rise to corruption and the appearance of corruption. This threat of corruption and the appearance of corruption is compounded by the fact that citizens do not have the “information needed” to “see whether elected officials are ‘in the

pocket' of so-called moneyed interests." *Citizens United*, 130 S. Ct. at 916.

**A. Current Law's Accommodation Of Close Relationships Between Candidates And So-Called "Independent" Spenders Gives Rise To Corruption And The Appearance Of Corruption.**

*Citizens United* wrongly assumed that "[t]he absence of prearrangement and coordination . . . with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 908 (quoting *Buckley*, 424 U.S. at 47). In *Buckley*, this quote follows a dubious presumption that expenditures meeting the legal definition of "independent expenditure" are in fact "made *totally independently* of the candidate and his campaign." 424 U.S. at 47 (emphasis added).

In *McConnell*, discussing the "dividing line" between "coordinated" and "independent" expenditures, the Court emphasized that the latter should be "expenditures that truly are independent" and quoted the *Buckley* Court's assertion that such expenditures should be made "totally independently of the candidate and his campaign." 540 U.S. at 221 (quoting *Buckley*, 424 U.S. at 47).

Perhaps it is this rhetoric regarding expenditures "that are truly independent" and made "totally independently" of candidates that led the *Citizens United*

Court to conclude that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 130 S. Ct. at 909.

However, federal campaign finance laws and the laws of most states *do not* require "true" or "total" independence between candidates and so-called independent spenders. Instead, "coordination" only occurs under federal law when an expenditure for a specific communication (i.e., political ad) meets *both* prongs of the "coordinated communication" regulation: (1) the ad contains specified content<sup>3</sup> and (2) the candidate suggests or requests the ad; is materially involved in the spender's decisions regarding the content of the ad, the intended audience, or the media outlet used; or otherwise meets one of the rule's narrow "conduct" standards.<sup>4</sup> See 11 C.F.R. §§ 109.21(c) (content standards) and 109.21(d) (conduct standards).

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<sup>3</sup> The "coordination" rule's "content" standards vary depending on the proximity of the ad to an election. If the ad is aired more than 120 days before a Presidential primary election, or more than 90 days before a House or Senate election, the ad only meets the "content" standard if it expressly advocates a candidate's election or defeat, or republishes a candidate's campaign materials. See 11 C.F.R. § 109.21(c).

<sup>4</sup> The "coordination" rule's "conduct" standards are also met by use of a "common vendor" absent a firewall, or involvement of a person or contractor who had been employed by the candidate in the previous 120 days, absent a firewall. See 11 C.F.R. §§ 109.21(d)(1)-(5) and 109.21(h).

Federal coordination rules are so narrow and limited in scope that an “independent” spender can be married to a candidate and share the same home without running afoul of federal coordination limits, so long as the spouses refrain from discussing the details of specific ad buys.

Some of the most prominent “independent expenditure” organizations – raising unlimited corporate, union and individual funds to finance their expenditures – have been set up by close associates and former employees of the candidates they support.

For example, the “independent expenditure-only political committee” (a.k.a. “super PAC”) Restore Our Future, which is dedicated to the election of Mitt Romney as President of the United States, is run by several former Romney aides, including Charles R. Spies, who served as general counsel to Romney’s 2008 Presidential campaign.<sup>5</sup> Super PAC American Crossroads was co-founded by Ed Gillespie,<sup>6</sup> who recently became a Senior Advisor to Mitt Romney’s

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<sup>5</sup> See Dan Eggen and Chris Cillizza, *Romney backers launch ‘super PAC’ to raise and spend unlimited amounts*, Wash. Post, June 23, 2011, available at [http://www.washingtonpost.com/politics/romney-backers-launch-super-pac/2011/06/22/AGTkGchH\\_story.html](http://www.washingtonpost.com/politics/romney-backers-launch-super-pac/2011/06/22/AGTkGchH_story.html).

<sup>6</sup> See Chris Good, *Karl Rove’s American Crossroads GPS Rakes in \$76M*, ABC News, Apr. 17, 2012, <http://abcnews.go.com/blogs/politics/2012/04/karl-roves-american-crossroads-gps-rakes-in-76m/>; see also <http://www.crossroadsgps.org> and <http://www.americancrossroads.org>.

2012 presidential campaign.<sup>7</sup> The super PAC Priorities USA Action, which supports the reelection of President Obama, was co-founded by former Obama White House aides Bill Burton and Sean Sweeney.<sup>8</sup>

Not only does the law permit close associates and former employees of candidates to set up “independent expenditure” committees, but the FEC has also interpreted federal law to permit candidates to “attend, speak at, and be featured guests at fundraisers for the Committees at which unlimited individual, corporate, and labor organization contributions are solicited, so long as they restrict any solicitation they make to funds subject to the [Federal Election Campaign Act’s] limitations, prohibitions and reporting requirements.” FEC Advisory Op. 2011-12, 2011 WL 2662413, at \*1 (June 30, 2011). Super PACs and the candidates they support immediately capitalized on the FEC’s blessing of coordinated fundraising.<sup>9</sup> The ability of candidates to be featured guests and speakers

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<sup>7</sup> See Jonathan Martin, *Ed Gillespie joins Team Romney*, Politico, Apr. 5, 2012, <http://www.politico.com/news/stories/0412/74857.html>.

<sup>8</sup> See Dave Levinthal and Kenneth P. Vogel, *Obama super PAC raises \$2.5M*, Politico, Apr. 20, 2012, <http://www.politico.com/news/stories/0412/75419.html>.

<sup>9</sup> See, e.g., Peter Stone, *Democrats and Republicans alike are exploiting new fundraising loophole*, iWatchNews, July 26, 2011, <http://www.iwatchnews.org/2011/07/27/5409/democrats-and-republicans-alike-are-exploiting-new-fundraising-loophole>; Kenneth P. Vogel, *Rick Santorum Speaks at super PAC fundraiser*, Politico, Feb. 24, 2012, <http://www.politico.com/news/stories/0212/73262.html>.



at the fundraising events of so-called "independent" spenders obliterates any notion of "true" or "total" independence.

The simple fact that the spending of unlimited corporate, union and individual dollars meets the legal definition of "independent expenditure" by no means "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Citizens United*, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47).

Experience since *Citizens United* has taught that – with the law's ready accommodation of close relationships and coordinated fundraising activities between candidates and supposedly "independent" spenders – independent expenditures do give rise to corruption and the appearance of corruption.

**B. The Absence Of Effective Disclosure Of Corporate Money In Elections Gives Rise To Corruption And The Appearance Of Corruption.**

Justice Brandeis famously wrote nearly a century ago: "Sunlight is . . . the best . . . disinfectant," and "electric light the most efficient policeman." Louis Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933), quoted in *Buckley*, 424 U.S. at 67.

This Court has long agreed with Justice Brandeis, recognizing the importance of disclosure to preventing

political corruption. In *Burroughs v. United States*, 290 U.S. 534 (1934), the Court wrote that it “cannot be denied” that disclosure “would tend to prevent the corrupt use of money to affect elections[.]” *Id.* at 548.

Similarly, in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court made clear that “informed public opinion is the most potent of all restraints upon misgovernment.” *Id.* at 250.

Decades later, the *Buckley* Court reiterated:

*[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.*

424 U.S. at 67 (footnotes omitted) (emphasis added). As this passage from *Buckley* makes clear, the corruption-preventing value of disclosure is inextricably linked to the broader necessity for a well-informed electorate – a “public armed with information” – in a democracy such as ours. *Id.* Furthermore,

*[D]isclosure provides the electorate with information “as to where political campaign money comes from and how it is spent by the candidate” in order to aid the voters in evaluating those who seek federal office. . . . The*

sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

*Id.* at 66-67 (footnote omitted).

Again in *McConnell*, the Court recognized disclosure's vital role in "providing the electorate with information, *detering actual corruption and avoiding any appearance thereof*, and gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196 (emphasis added). *McConnell* recognized the importance of the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)).

The importance of effective disclosure to preventing corruption is thus well established. Without effective disclosure, corruption thrives and, in the words of Justice Scalia, "democracy is doomed." *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

As *amici* explain in Section II, below, corporations freed by *Citizens United* to make unlimited political expenditures and, by extension, unlimited contributions to other corporations making political

expenditures,<sup>19</sup> are denying citizens the information needed to hold corporations and elected officials accountable and make informed decisions on Election Day. The close relationships between so-called “independent” spenders and candidates, combined with the lack of disclosure, give rise to corruption and the appearance of corruption.

## **II. Corporations Spending Money In Candidate Elections Deny Shareholders And Citizens The Information Needed To Hold Corporations And Elected Officials Accountable And Make Informed Decisions On Election Day.**

Notwithstanding this Court’s assurance that disclosure would “provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters[.]” *Citizens United*, 130 S. Ct. at 916, corporations spending money to influence candidate elections have predictably denied shareholders and citizens such information. Corporations have clear incentives to avoid disclosure and accountability; federal tax and campaign finance laws, as well as state

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<sup>19</sup> See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (applying *Citizens United*’s reasoning to invalidate limits on contributions to political committees that make only independent expenditures); see also FEC Advisory Op. 2010-11, 2010 WL 3184269 (July 22, 2010) (concluding that “independent expenditure-only political committees” may accept unlimited contributions from corporations and labor organizations).

campaign finance laws, have accommodated their desire to do so. Consequently, non-disclosing corporations spent more than \$120 million to influence the 2010 federal midterm elections and far greater spending is predicted for 2012.

**A. Corporations Have Clear Incentives To Avoid Disclosure And Accountability – Target As “Exhibit A.”**

Shortly after the *Citizens United* decision, the *Wall Street Journal* reported:

Target Corp. sought to take advantage of new campaign-finance rules, but ended up putting a bull's eye on its back.

The Minneapolis retailer recently donated \$150,000 to a political group, Minnesota Forward, that backs pro-business candidates in statewide races, including a candidate for governor who opposes same-sex marriage. On Friday, hundreds of gay-rights supporters demonstrated outside Target stores in locations nationwide, and a petition promising a boycott, signed by more than 240,000, was delivered to Target.<sup>11</sup>

According to the report, the campaign against Target was orchestrated by MoveOn.org, whose director of

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<sup>11</sup> Brody Mullins and Ann Zimmerman, *Target Discovers Downside to Political Contributions*, Wall St. J., Aug. 7, 2010, available at <http://online.wsj.com/article/SB10001424052748703988304575413650676561696.html>.



public advocacy said "MoveOn and its members plan to gin up bad publicity for any company venturing into political campaigning."<sup>12</sup>

This is seemingly the optimal scenario envisioned by the *Citizens United* Court:

[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.

130 S. Ct. at 916.

Corporate managers around the nation, however, likely viewed this incident as a public relations nightmare. To understand why corporations wishing to influence elections would seek anonymity with respect to their political activities, Target's experience is "Exhibit A." Fortunately for corporate managers, evading disclosure laws is child's play. All a corporation needs to do to avoid publicity for its political spending is to give its funds to a nonprofit that can make political expenditures without disclosing its donors – making the money untraceable.

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<sup>12</sup> *Id.*

## B. Federal Tax Laws Accommodate Corporate Anonymity.

Following the *Citizens United* decision and Target's public relations nightmare, nonprofit corporations organized as tax-exempt "social welfare" organizations under the Internal Revenue Code (IRC), 26 U.S.C. § 501(c)(4), have engaged in an unprecedented amount of campaign spending to influence candidate elections. According to *amicus* Center for Responsive Politics (CRP), spending by all section 501(c) groups in the 2010 election is estimated to have exceeded \$120 million.<sup>13</sup> Virtually all of the money used for these campaign expenditures came from sources kept secret from the American people. The 2010 campaign thus witnessed the return of huge amounts of secret money to federal elections, to a degree not seen since Watergate. Candidate election-related spending by these nonprofit groups in this year's elections is predicted to far exceed 2010 spending.

Section 501(c)(4) of the IRC establishes tax-exempt status for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare. . . ." 26 U.S.C. § 501(c)(4). IRS regulations make clear that spending to intervene or participate in candidate elections does not

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<sup>13</sup> CRP, *2010 Outside Spending, by Groups*, May 16, 2012, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U>.

constitute "promotion of social welfare." 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii). Nevertheless, IRS regulations authorize section 501(c)(4) organizations to intervene and participate in candidate campaigns as long as such campaign activities do not constitute the organization's "primary" activity, which must be the promotion of social welfare. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i).

The IRS has not further defined the regulation's "primary activity" standard. Instead, a revenue ruling explains that "all facts and circumstances are taken into account in determining a § 501(c)(4) organization's primary activity."<sup>14</sup> According to a Congressional Research Service report, "some have suggested that primary simply means more than 50%. . . ." The report notes that "others have called for a more stringent standard," but explains that even this "more stringent" standard would still permit substantial campaign expenditures of up to 40% of total program expenditures.<sup>15</sup>

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<sup>14</sup> Rev. Rul. 68-45, 1968-1 C.B. 259.

<sup>15</sup> Erika Lunder and L. Paige Whitaker, Cong. Research Serv., R40183, *501(c)(4) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Law 2* (2009), available at <http://electionlawblog.org/archives/R40183.pdf>; see also *Comments of the Individual Members of the ABA Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics* 44 (2004), available at <http://www.abanet.org/tax/pubpolicy/2004/040525exo.pdf>.

Section 501(c)(5) labor unions and section 501(c)(6) trade associations are treated similarly under tax law, *see* 26 U.S.C. §§ 501(c)(5), 501(c)(6), making these organizations additional appealing options to hide the sources of money. The U.S. Chamber of Commerce, a trade association exempt from federal income tax under section 501(c)(6), spent almost \$33 million in the 2010 midterm elections and is predicted to spend more than \$50 million in this year's elections – funds raised over and above its normal dues.<sup>16</sup>

Federal tax law permits section 501(c) tax-exempt organizations to raise unlimited sums from any source – and *does not require such organizations to disclose the sources of their funding to the public.*<sup>17</sup> Consequently, these nonprofit corporations present attractive vehicles for business corporations and others to influence candidate elections unhindered by the transparency and accountability envisioned in *Citizens United*.

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<sup>16</sup> See Eliza Newlin Carney, *U.S. Chamber of Commerce Faces Changing Times*, Roll Call, Apr. 24, 2012, available at [http://www.rollcall.com/issues/57\\_126/US-Chamber-of-Commerce-Faces-Changing-Times-214020-1.html?pos=hftxt](http://www.rollcall.com/issues/57_126/US-Chamber-of-Commerce-Faces-Changing-Times-214020-1.html?pos=hftxt).

<sup>17</sup> Section 501(c)(4), (c)(5), and (c)(6) organizations must report to the IRS the names and addresses of significant donors, but this information is *not publicly disclosed*. See IRS Form 990, Sched. B, Sched. of Contributors (OMB No. 1545-0047).

### C. Federal Campaign Finance Laws Accommodate Corporate Anonymity.

Although federal campaign finance law requires every “political committee” to disclose the name of any person who contributes more than \$200 to the committee, only groups with the “major purpose” of influencing elections qualify as “political committees.” See *Buckley*, 424 U.S. at 79; see also Pol. Comm. Status, Supp. Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007). Consequently, business corporations and 501(c) nonprofit corporations generally are not regulated as “political committees” and, instead, are subject to far less rigorous disclosure requirements.<sup>18</sup>

When a business corporation or 501(c) nonprofit corporation makes an “independent expenditure” in excess of \$250, such spender is only required to disclose the name of a “person who made a contribution in excess of \$200 . . . for the purpose of furthering an

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<sup>18</sup> As registered political committees, super PACs are required to disclose contributors who give more than \$200. However, super PACs may also receive contributions from corporations – which themselves have been used to hide the true source of funds. Last year, for example, the super PAC Restore Our Future reported its receipt of three \$1 million contributions of questionable legality from mysterious corporate donors – W Spann LLC, F8 LLC and Eli Publishing, L.C. These corporate donors had no discernible business activities and, therefore, appear to have been used specifically for the purpose of hiding the true donors’ identities. See Michael Isikoff, *Firm gives \$1 million to pro-Romney group, then dissolves*, NBC News, Aug. 4, 2011, [http://today.msnbc.msn.com/id/44011308/ns/politics-decision\\_2012](http://today.msnbc.msn.com/id/44011308/ns/politics-decision_2012).



independent expenditure.” 2 U.S.C. § 434(c)(2)(C) (emphasis added).<sup>19</sup>

Similarly, the FEC regulation implementing the “electioneering communication” donor disclosure requirement of 2 U.S.C. § 434(f)(2) provides that a corporation or labor union that spends more than \$10,000 on “electioneering communications” need only disclose the name of each person who made a donation of \$1,000 or more “*for the purpose of furthering electioneering communications.*” 11 C.F.R. § 104.20(c)(9) (emphasis added). “For the purpose of furthering” means “specifically designated for [electioneering communications] by the donor.” Electioneering Commc’ns, Supp. Explanation and Justification, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).<sup>20</sup> This regulation was

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<sup>19</sup> The FEC has further undermined this donor disclosure requirement by promulgating a rule requiring disclosure only when the person contributes “for the purpose of furthering *the reported independent expenditure.*” See 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). Under the statute, a contribution for the purpose of furthering independent expenditures, generally, would trigger disclosure, whereas triggering disclosure under the FEC rule requires a person to contribute *for the purpose of furthering a specific ad.*

<sup>20</sup> Three members of the six-member FEC blocked an investigation into whether the 501(c)(4) corporation Freedom’s Watch violated the law by failing to disclose a major donor after making “electioneering communications.” The three Commissioners interpreted the regulation even more narrowly than its plain language requires, stating that donor disclosure is required “only if such donations are made for the purpose of furthering the electioneering communication *that is the subject of the report.*” See Statement of Reasons of Chairman Matthew S. (Continued on following page)

recently invalidated by a D.C. district court, although an appeal is pending. See *Van Hollen v. FEC*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 1066717 (D.D.C. Mar. 30, 2012), *appeal docketed*, No. 12-5117 (D.C. Cir. Apr. 18, 2012).

Under these “independent expenditure” and “electioneering communication” donor disclosure requirements, corporate and other donors to 501(c) organizations simply refrain from designating contributions specifically for the purpose of funding election ads and, by doing so, avoid federal campaign finance law disclosure requirements.

#### **D. States’ Campaign Finance Laws Accommodate Corporate Anonymity.**

*Amicus* National Institute on Money in State Politics (NIMSP) recently conducted a two-part study of all 50 states’ disclosure requirements for independent spending (both “independent expenditures” and “electioneering communications”).<sup>21</sup> Unfortunately, NIMSP’s report paints a bleak picture of disclosure in the states; state disclosure requirements are, for the

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Pettersen and Comm’rs Caroline C. Hunter and Donald F. McGahn, *FEC Matter Under Review 6002*, at 5 (Aug. 2010) (emphasis added), available at <http://eqs.nictusa.com/eqsdocsMUR/10044274536.pdf>.

<sup>21</sup> See Anne Bauer, *Best Practices for Independent Spending: Part One*, NIMSP, July 14, 2011, <http://www.followthemoney.org/press/ReportView.phtml?r=453>.

most part, even less robust than their ineffective federal counterparts.

In most states, disclosure of independent spending is either significantly flawed or nonexistent. 43 states require disclosure of independent spending to some degree, but only 19 of them require the reporting of both types of independent spending: electioneering communications and independent expenditures. Not only is the disclosure of independent spending limited, many states do not require the disclosure of who funded these expenditures. *Of the states studied, only nine require the disclosure of contributions to independent spenders, making it difficult to know who is actually behind these independent political advertisements.*

The inadequate or nonexistent disclosure in the states results in millions of dollars of political spending going unreported. In Michigan, for example, at least \$22.9 million of televised electioneering communications went unreported in the 2010 elections, which far exceeds the \$7.9 million of reported independent spending. Unfortunately, Michigan is not an outlier. Thirty other states fail to require disclosure of the money spent on electioneering communications, making it

impossible to know the full extent of independent spending at the state level.<sup>22</sup>

Just as federal laws readily accommodate corporations wanting to spend millions to influence candidate elections while maintaining anonymity, so too do most states' laws. Because most states do not require independent spenders to disclose their contributors, corporations can indirectly fund election ads by routing contributions through non-disclosing 501(c) organizations. NIMSP's report detailed one such example, in Iowa: "[T]hree justices up for retention [as state supreme court justices] in 2010 had signed a unanimous decision in 2009 that legalized gay marriage in Iowa. In response, several conservative Christian organizations used independent expenditures to oppose the justices' retention."<sup>23</sup> According to NIMSP's report, one of these organizations was the 501(c)(4) American Family Association Action ("AFA Action"), which created an Iowa state political committee called Iowa for Freedom for the sole purpose of funding independent expenditures targeting the three justices.<sup>24</sup> AFA Action routed more than \$170,000 in expenditures through Iowa for Freedom, but neither

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<sup>22</sup> Kevin McNellis, *Best Practices for Independent Spending: Part Two*, NIMSP, Mar. 15, 2012, <http://www.followthemoney.org/press/ReportView.phtml?r=480> (emphasis added).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* See also Iowa Ethics & Campaign Disclosure Bd. Advisory Op. 2010-07, available at [http://www.iowa.gov/ethics/legal/adv\\_opn/2010/10fao07.htm](http://www.iowa.gov/ethics/legal/adv_opn/2010/10fao07.htm).

entity disclosed the money's origin because, like federal law, Iowa law requires spenders to disclose only those donors who have provided funds "for the purpose of furthering the independent expenditure."<sup>25</sup>

Like most states, Montana's independent expenditure disclosure laws fail to provide citizens the information needed to hold corporations and elected officials accountable and to make informed decisions on Election Day. Indeed, although Montana requires groups making independent expenditures to file disclosure reports and to disclose the sources of "contributions" exceeding \$35, state law defines "contribution" as money given "to influence an election," meaning funds given to such groups without a stated purpose go undisclosed. See Mont. Code Ann. §§ 13-1-101(c)(a)(i) (defining "contribution"), 13-1-101(22) (defining "political committee"), 13-37-225 (establishing reporting requirements) and 13-37-229 (requiring itemization for contributions of \$35 or more). By contrast, the "segregated fund" requirement of the statute at issue in this case resolves this disclosure problem as to corporations by requiring campaign funds (including any contributions so used regardless of stated purpose) to be held separately from every other source of income. See Mont. Code Ann. § 13-35-227(3).

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<sup>25</sup> See Iowa Code § 68A.404(3)(a)(2). See also Iowa Ethics & Campaign Disclosure Bd. Advisory Op. 2010-07, *supra* note 24.



If this Court does not affirm the Montana Supreme Court's decision upholding Montana's prohibition on corporate political expenditures, corporations will undoubtedly deny shareholders and citizens the information needed to hold corporations and elected officials accountable and to make informed decisions on Election Day.

**E. More Than \$120 Million In Anonymous Funds Was Spent To Influence 2010 Elections, With Far Greater Spending Predicted For 2012.**

*Amicus* CRP's analysis of publicly available data shows that section 501(c) groups spent more than \$120 million on candidate-election related ads during the 2010 midterm elections. The 501(c)(6) U.S. Chamber of Commerce spent nearly \$33 million, raised above and beyond normal dues, without disclosing the sources of its funding – undoubtedly business corporations denying “shareholders and citizens . . . the information needed to hold corporations and elected officials accountable for their positions and supporters.” *Citizens United*, 130 S. Ct. at 916. The 501(c)(4) group American Action Network spent more than \$26 million on election-related ads in 2010 without disclosing the sources of its funding. According to *amicus* CRP, more than twenty 501(c) nonprofit corporations spent more than a half-million

dollars each on 2010 election ads without disclosing the sources of their funding.<sup>26</sup>

Not surprisingly, since this Court opened the door to unlimited 501(c) spending by corporations with its 2010 decision in *Citizens United*,<sup>27</sup> the percentage of federal election-related spending by groups that do not disclose their donors rose from 1 percent to 47 percent from the 2006 midterm elections to the 2010 midterm elections.<sup>28</sup>

Non-disclosing 501(c) groups are just getting started in the 2012 elections, as most big spenders wait out the primary election season and prepare for the general elections. On April 24, 2012, the *Washington Post* reported:

Nearly all of the independent advertising being aired for the 2012 general-election campaign has come from interest groups that do not disclose their donors, suggesting that much of the political spending over the next six months will come from sources invisible to the public.

Politically active nonprofit groups that do not reveal their funding sources have spent \$28.5 million on advertising related to the

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<sup>26</sup> See CRP, *supra* note 13.

<sup>27</sup> Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, Open Secrets Blog, May 5, 2011, <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

November presidential matchup, or about 90 percent of the total through Sunday, a Washington Post analysis shows.<sup>28</sup>

The American Crossroads/Crossroads GPS operation perhaps best illustrates how dearly major funders of election ads wish to avoid disclosure. American Crossroads is a super PAC that discloses its donors to the FEC, while Crossroads GPS is a 501(c)(4) corporation that does not disclose its donors. Both were co-founded in 2010 by Republican Party strategists Ed Gillespie<sup>29</sup> and Karl Rove,<sup>30</sup> and both are operated by Steven Law, who serves as the president of both organizations.<sup>31</sup> Supporters of this operation have a choice: contribute to the super PAC and be disclosed or contribute to the 501(c)(4) and remain hidden from public view. According to American Crossroads' political director Carl Forti, the

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<sup>28</sup> Dan Eggen, *Most independent ads for 2012 election are from groups that don't disclose donors*, Wash. Post, Apr. 24, 2012, available at [http://www.washingtonpost.com/politics/most-independent-ads-for-2012-election-are-from-groups-that-dont-disclose-donors/2012/04/24/gIQAckKpft\\_story.html](http://www.washingtonpost.com/politics/most-independent-ads-for-2012-election-are-from-groups-that-dont-disclose-donors/2012/04/24/gIQAckKpft_story.html).

<sup>29</sup> Mr. Gillespie is former Chairman of the Republican National Committee, former Counselor to President George W. Bush and recently became a Senior Advisor to Mitt Romney's 2012 presidential campaign. See Jonathan Martin, *Ed Gillespie joins Team Romney*, Politico, Apr. 5, 2012, <http://www.politico.com/news/stories/0412/74857.html>.

<sup>30</sup> Mr. Rove served as Senior Advisor and Deputy Chief of Staff to President George W. Bush. See <http://www.rove.com/bio>.

<sup>31</sup> See Good, *supra* note 6; see also <http://www.crossroadsgps.org> and <http://www.americancrossroads.org>.

501(c)(4) was formed precisely because “some donors didn’t want to be disclosed” and were “more comfortable” giving to an entity that keeps donors’ names secret.<sup>32</sup> Indeed, Crossroads GPS’s purpose as a vehicle for donor anonymity is so blatant that it has become fodder for late night television, with Stephen Colbert, Comedy Central’s faux newsman, creating his own mock 501(c)(4) group, Colbert Super PAC S.H.H.<sup>33</sup>

The *Washington Post* reported that Crossroads GPS “raised nearly \$40 million from unidentified donors” in the first quarter of 2012, “compared with less than \$10 million taken in by its affiliated super PAC, American Crossroads.”<sup>34</sup> In other words, the non-disclosing 501(c)(4) Crossroads GPS out-fundraised its disclosing super PAC counterpart American Crossroads by a ratio of 4-to-1.

Similarly, Petitioner American Tradition Partnership’s (ATP) “purpose, according to un-rebutted evidence submitted to the District Court by the State, is to solicit and anonymously spend the funds of other corporations, individuals and entities to influence the

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<sup>32</sup> Brooks Jackson, *American Crossroads/Crossroads GPS*, Factcheck.org, Sept. 18, 2011, <http://www.factcheck.org/2011/09/american-crossroadscrossroads-gps>.

<sup>33</sup> See *The Colbert Report* (Comedy Central television broadcast Apr. 3, 2012), available at <http://www.colbertnation.com/the-colbert-report-videos/411673/april-03-2012/colbert-super-pac-shh-501c4-disclosure>.

<sup>34</sup> See Eggen, *supra* note 28.

outcome of Montana elections." *W. Tradition P'ship, Inc. v. Att'y Gen.*, 271 P.3d 1, 7 (Mont. 2011). ATP explained to its prospective donors:

[W]e're not required to report the name or the amount of any contribution that we receive. So, if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible. *The only thing we plan on reporting is our success to contributors like you.*

*Id.*

The American Crossroads/Crossroads GPS operation, as well as petitioner ATP, make clear that, contrary to this Court's assurances in *Citizens United*, there exists inadequate disclosure to "provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." 130 S. Ct. at 916. While *Citizens United* did indeed protect corporate political speech, the disclosure expected to "permit[] citizens and shareholders to react to the speech of corporate entities in a proper way" never materialized. *Id.*



### **III. Data That Is Disclosed Is Neither Timely Enough, Nor Accessible Enough, To Enable The Electorate To Make Informed Decisions On Election Day.**

The electorate's ability to make informed decisions on Election Day is hindered not only by a lack of disclosure, but also by delayed disclosure and poor access to needed information.

For example, though super PACs must disclose the identity of contributors who give them more than \$200, numerous high-profile super PACs raising and spending unlimited funds to influence this year's January presidential caucuses and primaries did not file disclosure reports with the FEC until *after* the caucuses and primaries had taken place.<sup>35</sup>

Additionally, super PACs are permitted to accept contributions from 501(c) corporations and, when they do so, need only disclose the fact that they received a contribution from the 501(c) corporation. As explained in Part II(B), *supra*, these 501(c) corporations are not required to disclose to the public the sources of their funding. Consequently, even when a super PAC discloses its receipt of a contribution from

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<sup>35</sup> See, e.g., Keenan Steiner, *Presidential Super PAC disclosures may leave voters in the dark*, Sunlight Foundation Reporting Group, Dec. 21, 2011, <http://reporting.sunlightfoundation.com/2011/presidential-super-pac-disclosures-may-leave-voters-in-the-dark>.

a 501(c) corporation, voters are nevertheless denied information regarding the money's true source.<sup>36</sup>

Finally, much of the independent spending data that *is* disclosed to campaign finance regulatory agencies is inaccessible to or unusable by the public. Effective access requires comprehensive, Internet-based, easily searchable and downloadable databases. Despite this Court's assurances in *Citizens United* that "modern technology makes disclosures rapid and informative" and that "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters[.]" 130 S. Ct. at 916, such technology is not effectively employed in many states.<sup>37</sup> Private organizations such as *amici* CRP and NIMSP spend millions of dollars annually to clean up, fill in the gaps and release to the public useful information gleaned from government databases.

Just as undisclosed money in elections gives rise to corruption and the appearance of corruption, so too

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<sup>36</sup> See, e.g., Kenneth P. Vogel and Abby Phillip, *Primer: How super PACs rake it in*, Politico, Feb. 8, 2012, <http://www.politico.com/news/stories/0212/72611.html> (reporting that non-disclosing groups gave \$8 million to super PACs during the 2010 midterm elections).

<sup>37</sup> See, e.g., McNellis, *supra* note 22.

does money disclosed too late, disclosed with insufficient detail or disclosed with inadequate public access.

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## CONCLUSION

*Certiorari* should be denied. If, however, the Court grants *certiorari*, the Court should grant plenary review, reconsider its holding in *Citizens United* that independent expenditures do not give rise to corruption or the appearance of corruption, and affirm the judgment of the Supreme Court of Montana.

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## APPENDIX

The following groups constitute the *amici curiae* who submit the foregoing brief:

- **AARP** is a nonpartisan, nonprofit organization dedicated to assuring that older Americans have independence, choice and control in ways beneficial and affordable to them and to society as a whole. AARP engages in advocacy to implement public policies of benefit to older Americans. AARP policy recognizes that the federal government should encourage disclosure by all who participate in supporting or opposing specific candidates and that all campaign funding and financing entities should provide timely and full disclosure of contributions to enable the electorate to make informed decisions and give proper weight to different speakers and messages.
- The **Campaign Legal Center** is a nonprofit, nonpartisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing campaign finance and other election laws throughout the nation. It participates in rulemaking and advisory opinion proceedings at the FEC to ensure that the agency is properly enforcing federal election laws, and files complaints with the FEC requesting that enforcement actions be taken against individuals or organizations that violate the law.

- **The Center for Responsive Politics (CRP)** is the nation's premier research group tracking money in U.S. politics and its effect on elections and public policy. Nonpartisan, independent and nonprofit, the organization aims to create a more educated voter, an involved citizenry and a more transparent and responsive government. CRP pursues its mission largely through its award-winning website, [OpenSecrets.org](http://OpenSecrets.org), which is the most comprehensive resource for federal campaign contributions, lobbying data and analysis available anywhere.
- **The Chicago Lawyers' Committee for Civil Rights Under Law, Inc.** is the public interest law consortium of Chicago's leading law firms. From nineteen firms in 1969, the Chicago Lawyers' Committee has grown to more than fifty members today. Each year, almost 19,000 hours of donated professional legal services, with a value of over \$8.5 million are directed to challenge discrimination and other violations of civil rights in both public and private sectors.
- **Citizens for Responsibility and Ethics in Washington (CREW)** is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among



its principal activities, CREW monitors the activities of members of Congress and, where appropriate, files ethics complaints with Congress. CREW also prepares written reports, including a yearly report it disseminates publicly about the most unethical members of Congress.

- **Common Cause** is a nonprofit, nonpartisan organization with approximately 300,000 members and supporters nationwide. Common Cause has long supported efforts to reform campaign finance laws to reduce the potential for actual and apparent *quid pro quo* corruption. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002.
- **Illinois Campaign for Political Reform (ICPR)** is a nonprofit and nonpartisan public interest group focused on state and local elections in Illinois that conducts research and advocates reforms to promote public participation and to encourage integrity, accountability, and transparency in both government and the election process. Founded in 1997 by the late U.S. Senator Paul Simon and former Illinois Lieutenant Governor Bob Kustra, ICPR's guiding principles seek to restore honest, open, and accountable government and re-invigorate public confidence and civic involvement.
- **The League of Women Voters of the United States** is a nonpartisan, community-based organization that encourages the

informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in 800 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than three decades.

- The **Michigan Campaign Finance Network (MCFN)** is a nonprofit, nonpartisan organization that conducts research and provides public education on money in Michigan politics. MCFN has a particular research emphasis on undisclosed electioneering spending in Michigan political campaigns that was summarized in the 2011 report, "\$70 Million Hidden in Plain View."
- The **National Institute on Money in State Politics (NIMSP)** is a nonprofit, nonpartisan organization created to provide the public accurate, comprehensive and highly credentialed information about the campaign finances of legislative and statewide candidates in all 50 states, as well as party committees and ballot measures, and

registered state-level lobbyists. It works with the 50 different state disclosure agencies to ensure it compiles complete information, and to advise those agencies on "best practices" for providing public access to political donor information and on donor-reporting requirements in other states. ([www.followthemoney.org](http://www.followthemoney.org))

- **Progressives United** is a nonprofit, nonpartisan organization created to influence policymakers, opinion leaders, and the public about the corrupting influence of unlimited and corporate money in our political system. Progressives United was founded by former U.S. Senator Russ Feingold, co-author of the Bipartisan Campaign Reform Act of 2002.
- The **Sunlight Foundation** was founded in 2006 with the nonpartisan mission of using the revolutionary power of the Internet to make information about Congress and the federal government more meaningfully accessible to citizens. Through its projects and grant-making, Sunlight serves as a catalyst for greater political transparency, thus making the government more open and accountable. Sunlight's ultimate goal is to strengthen the relationship between citizens and their elected officials and to foster public trust in government. Since its founding, Sunlight has assembled and funded an array of Web-based databases and tools, including [OpenCongress.org](http://OpenCongress.org), [FedSpending.org](http://FedSpending.org), [OpenSecrets.org](http://OpenSecrets.org), and [Earmark Watch.org](http://EarmarkWatch.org), that make millions of bits of

information available online about members of Congress, their staff, legislation, federal spending, and lobbyists. The Sunlight Foundation has a particular interest in promoting the electronic disclosure of political expenditures at all levels of government.

- **U.S. PIRG Education Fund** is a federation of independent, state-based, citizen-funded organizations that advocate for the public interest. Since 1970, state PIRGs have delivered results-oriented citizen activism, stood up to powerful special interests, and used the time-tested tools of investigative research, media exposés, grassroots organizing, and litigation to win real results on issues that matter. Across the country, state PIRGs employ close to 400 organizers, policy analysts, scientists and attorneys, and are active in 47 states, with a federal office in Washington, D.C. On national issues, they also coordinate their efforts, pool resources, and share expertise so that they can have the biggest impact.
- **The Wisconsin Democracy Campaign (WDC)** is a nonprofit, nonpartisan citizen organization that specializes in tracking the money in Wisconsin politics. WDC manages an extensive online database of contributors to state campaigns and also monitors interest group electioneering. It has frequently filed complaints with the state Government

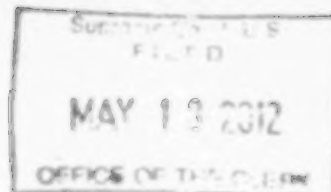
App. 7

Accountability Board to prompt enforcement action, and is a regular participant in the GAB's rulemaking process relating to campaign finance regulation.

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**AMICUS  
CURIAE  
BRIEF**



No. 11-1179

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**In The  
Supreme Court of the United States**

American Tradition Partnership, Inc., f.k.a. Western  
Tradition Partnership, Inc., *Petitioners,*

v.

Steve Bullock, Attorney General of Montana, et al.,  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MONTANA

**BRIEF FOR UNITED STATES  
REPRESENTATIVES ROBERT BRADY,  
CHRIS VAN HOLLEN, ZOE LOFGREN AND  
CHARLES GONZALEZ  
AS AMICI CURIAE IN SUPPORT OF  
RESPONDENTS**

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## TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST.....	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	4
I. <i>Citizens United</i> Has Reduced Disclosure, Transparency and Accountability....	4
II. The Court Should Reaffirm That Citizens United Permits Congress And State Legislatures To Establish Disclosure Requirements For Corporate Independent Expenditures .....	13
CONCLUSION .....	18

## TABLE OF AUTHORITIES

### CASES

<i>Burroughs v. United States</i> , 290 U.S. 534 (1934) .....	13
<i>Citizens United v. Federal Election Commission</i> , 130 S. CT. 876 (2010) .....	Passim
<i>Fed. Election Comm'n v. Mass. Citizens For Life, Inc.</i> , 479 U.S. 238 (1986) .....	15
<i>First Nat'l Bank of Bos. v. Bellotti</i> , 435 U.S. 765 (1978) .....	9,10
<i>McConnell v. Fed. Election Comm'n</i> , 540 U.S. 93 (2003) .....	3
<i>Randall v. Sorrell</i> , 548 U.S. 230 (2006) .....	15
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932) .....	13
<i>United States v. Harriss</i> , 347 U.S. 612 (1954) .....	14
<i>Van Hollen v. Fed. Election Comm'n</i> , -- F.Supp.2d -- (D.D.C. Mar. 30, 2012) .....	8

### CONSTITUTIONAL AUTHORITIES

U.S. CONST., art. I, § 4, cl. ....	13
------------------------------------	----

## REGULATIONS

11 C.F.R. § 110.1(E) .....	12
----------------------------	----

## LEGISLATIVE MATERIALS

156 Cong. Rec. H4799-4800 (Daily Ed. June 24, 2010) .....	17
156 Cong. Rec. H4806 (Daily Ed. June 24, 2010) ...	17
156 Cong. Rec. H4828 (Daily Ed. June 24, 2010) ...	16
156 Cong. Rec. S7388 (Daily Ed. Sep. 23, 2010) .....	16
H.R. 5175, 111th Cong. (2010).....	16

## NEWS ARTICLES

Jeanne Cummings, <i>Investors Seek Clarity on Campaign Giving</i> , WALL ST. J., Apr. 5, 2006 ..	10
Danielle Kurtzleben, <i>2010 Set Campaign Spending Records</i> , U.S. NEWS & WORLD RPT., Jan. 7, 2011 .....	4
Michael Luo & Stephanie Strom, <i>Donor Names Remain Secret as Rules Shift</i> , N.Y. Times, Sept. 20, 2010 .....	7,8
Fredreka Schouten & Christopher Schnaars, <i>Reports show hard-to-track donors dominate outside giving</i> , USA TODAY, Apr. 22, 2012.....	5

## TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<p>Demos &amp; U.S. PIRG Education Fund,  <i>Auctioning Democracy: The Rise of Super  PACs and the 2012 Election</i>, Feb. 8, 2012,  <i>available at</i> <a href="http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election">http://www.demos.org/  publication/auctioning-democracy-rise-  super-pacs-and-2012-election</a> .....</p>	15-16
<p>Dan Eggen, <i>Most Independent Ads for 2012  Election Are From Groups That Don't  Disclose Donors</i>, Wash. Post, Apr. 24, 2012 .....</p>	18
<p>Kim Geiger, <i>FEC Deadlocks on Question of  Coordinated Advertising</i>, L.A. Times, Dec.  5, 2011, <a href="http://articles.latimes.com/2011/dec/05/news/la-pn-crossroads-fec-20111205">http://articles.latimes.com/2011/  dec/05/news/la-pn-crossroads-fec-20111205</a>.....</p>	11
<p>Maggie Haberman, <i>Coordination Rules A One-  Way Street</i>, Politico, May 2, 2012,  <a href="http://www.politico.com/news/stories/0512/75834.html">http://www.politico.com/news/stories/  0512/75834.html</a> .....</p>	10
<p>Richard L. Hasen, <i>The Numbers Don't Lie</i>,  Slate, Mar. 9, 2012, <a href="http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending.html">http://www.slate.  com/articles/news_and_politics/politics/201  2/03/the_supreme_court_s_citizens_united_  decision_has_led_to_an_explosion_of_camp  aign_spending_.html</a>.....</p>	13
<p>Dave Johnson, <i>Super PAC Hate-Spending</i>,  Slate, Mar. 9, 2012, <a href="http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/03/where_super_pacs_are_spending_their_money_and_how.html">http://www.slate.  com/articles/news_and_politics/map_of_the  _week/2012/03/where_super_pacs_are_spen  ding_their_money_and_how_.html</a> .....</p>	19



# TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
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Letter to IRS from Campaign Legal Center, Dec. 14, 2011, <a href="http://www.campaignlegalcenter.org/attachments/IRS_LETTER_12_14_2011.pdf">http://www.campaignlegalcenter.org/attachments/IRS_LETTER_12_14_2011.pdf</a> .....	13
Dave Levinthal, <i>2011 Sees Super PAC Explosion</i> , Politico, Oct. 6, 2011, <a href="http://www.politico.com/news/stories/1011/65310.html">http://www.politico.com/news/stories/1011/65310.html</a> .....	9-10
Morgan Little, <i>Negative Ads Increase Dramatically During 2012 Presidential Election</i> , L.A. Times, May 3, 2012 .....	9
Michael Luo, <i>Groups Push Legal Limits in Advertising</i> , N.Y. Times, Oct. 17, 2010.....	15
Spencer MacColl, <i>A Center for Responsive Politics Analysis of the Effects of Citizens United</i> , May 5, 2011, available at <a href="http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html">http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html</a> .....	13, 17

## OTHER AUTHORITIES

Jessica A. Levinson, <i>We the Corporations? The Constitutionality of Limitations on Corporate Electoral Speech After Citizens United</i> , 46 U.S.F.L. REV. 307 (2011).....	11
Elizabeth Pollman, <i>Reconceiving Corporate Personhood</i> (Dec. 31, 2010).....	9
Jennifer S. Taub, <i>Money Managers In The Middle: Seeing and Sanctioning Political Spending After Citizens United</i> , 15 N.Y.U. J. LEGIS. & PUB. POL'Y 443 (2012).....	10,11
Monica Youn, Testimony on "The Fair Elections Now Act: A Comprehensive Response to Citizens United" before the Subcommittee of the Constitution, Civil Rights & Human Rights of the U.S. Senate Judiciary Committee (Apr. 12, 2011) .....	5
Center for Responsive Politics Study .....	7
N.Y. Times Table – 2012 Independent Expenditures .....	5

## STATEMENT OF INTEREST\*

*Amici Curiae* are Members of the United States House of Representatives. United States Representative Brady is the Ranking Member and former Chairman of the Committee on House Administration. Representative Van Hollen was the lead sponsor of the DISCLOSE Act. Representative Lofgren is the Former Chairwoman of the Subcommittee on Elections. Representative Gonzalez is the Ranking Member of the Subcommittee on Elections.

As Members of Congress, *amici* have a strong interest in ensuring that our electoral process is not corrupted by lack of disclosure, transparency, or accountability in political spending. And, as this Court recognized in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), Congress' important interest in preserving the integrity of the political process entitles it to enact legislation that promotes and protects these values. Because the decision below is consistent with these interests, *amici* file this brief in support of

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\* No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of *amici's* intention to file this brief more than 10 days before it was due. Notices reflecting the consent of the parties to the filing of this brief have been filed with the Clerk of this Court.

respondents and in opposition to the petition for a writ of certiorari.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

When this Court held in *Citizens United* that the First Amendment protects corporate independent expenditures, it sought to place corporations in the same position as all others who express themselves through political spending. The Court's central premise was that the protection of speech does not depend on the identity of the speaker, *id.* at 913, and that corporations must be afforded the same freedom of political speech that individuals enjoy. But an equally important component of the Court's holding was that this freedom is not unfettered, and that Congress may impose disclosure requirements as a "less restrictive alternative to more comprehensive regulations of speech." *Id.* at 915. As the Court emphasized, "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," leading to a "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916.

In the wake of *Citizens United*, however, it has become glaringly apparent that the decision has not been interpreted or implemented in the way the Court envisioned. What has developed is a dramatic new source of spending, but without meaningful

disclosure or accountability. Citizens and shareholders are too often unable to see, as the Court put it, "whether elected officials are 'in the pocket' of so-called moneyed interests," and are thus unable "to hold corporations and elected officials accountable for their positions and supporters." *Id.* (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 259 (2003) (opinion of Scalia, J.)).

Legislators face serious challenges in fashioning and implementing the type of disclosure regime the Court assumed would ensure transparency and accountability in our election financing. For this reason, *amici* – House Members who are among those who have been on the forefront of campaign finance reform – focus in this brief on these new and increasingly urgent disclosure issues and their implication for transparency and accountability in our campaign finance system after *Citizens United*. *Amici* urge the Court to deny the petition for a *writ of certiorari*, because Montana law appropriately seeks the transparency essential to a well ordered democracy. But if the Court issues an order in response to the petition, *amici* urge the Court to address the important disclosure and accountability issues that are discussed here, and affirm once again that legislators may act to address them.

The purpose of this brief is three-fold: first, to inform the Court why the transparency and accountability presumed by *Citizens United* has not,

in fact, materialized; second, to explain that misinterpretation of *Citizens United* has prevented a legislative solution to the lack of transparency and accountability; and third, to urge the Court, if it issues an order, to affirm that *Citizens United* leaves room for – and, indeed, expressly contemplates – legislative action to ensure disclosure, transparency, and accountability in corporate independent expenditures. Any lack of clarity from the Court on this point risks accelerating the descent of the electoral process into a world shaped by anonymous donors, while emboldening those who stand to benefit from this new world to claim that neither the Congress nor state legislatures can do anything about it.

## ARGUMENT

### I. *Citizens United* Has Reduced Disclosure, Transparency and Accountability

The facts relating to the effects of *Citizens United* are stark and inescapable. The 2010 mid-term elections were the first federal elections after the decision, and “[a] substantial portion” of the spending by outside groups in those elections “was shrouded in secrecy . . . [a]ll told, four of the top 10 spending organizations did not disclose who funded their election-related activities.” Danielle Kurtzleben, *2010 Set Campaign Spending Records*, U.S. NEWS & WORLD RPT., Jan. 7, 2011, available at



<http://www.usnews.com/news/articles/2011/01/07/20110-set-campaign-spending-records>. See also Monica Youn, Testimony on "The Fair Elections Now Act: A Comprehensive Response to Citizens United" before the Subcommittee of the Constitution, Civil Rights & Human Rights of the U.S. Senate Judiciary Committee (Apr. 12, 2011), available at [http://brennan.3cdn.net/115f40822288b1bbd2\\_onm6bn0oy.pdf](http://brennan.3cdn.net/115f40822288b1bbd2_onm6bn0oy.pdf) (noting that disclosure of donors has dropped significantly among outside groups making electioneering communications and independent expenditures). And recent reports show that the same untraceable expenditures are already dominating the 2012 elections. Fredreka Schouten & Christopher Schnaars, *Reports show hard-to-track donors dominate outside giving*, USA TODAY, Apr. 22, 2012 (reporting that newly-filed campaign reports show that "[m]illions of dollars flowing to independent political groups dominating this year's presidential and congressional contests have come from mystery and hard-to-find donors"), available at <http://www.usatoday.com/news/politics/story/2012-04-22/mystery-donors-dominate-politicalgiving/54474378/1>.<sup>1</sup>

Thus, while the Court in *Citizens United* envisioned transparency that would enable the electorate "to make informed decisions and give

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<sup>1</sup> See also <http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals> (N.Y. Times table charting 2012 independent expenditures).

proper weight to different speakers and messages," 130 S. Ct. at 916, precisely the opposite has occurred. The electorate often has no idea who the speaker is and therefore cannot determine the weight to give many political messages. As important, with the ability to remain anonymous, speakers have little incentive to exercise any caution in their speech, knowing that they are insulated from accountability.

Petitioner Western Tradition Partnership (WTP) is a ready example of the urgency of these disclosure issues and the risks to transparency by those who would take advantage of the corporate form. No one knows WTP's funding sources or the identity of its contributors and, even if one did, those contributors themselves may only be acting for other undisclosed contributors. Indeed, WTP is designed to be opaque and unaccountable, boasting in its promotional materials that

[W]e're not required to report the name or the amount of any contribution that we receive. So, if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible.

Pet. App. 15a.

WTP is hardly an outlier. The path too many have taken from *Citizens United* is to use the corporate form to speak anonymously and without accountability. Multiple nonprofit corporations have been formed in the aftermath of *Citizens United* for the exclusive or predominate purpose of operating with minimal or no disclosure. See Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 20, 2010 at A1 (reporting that nonprofits which, like WTP, are formed under Section 501(c) of the tax code and are generally not required to report their donors started "popping up like mushrooms after a rain" in connection with the 2010 mid-term elections "and many of them will be out of business by late November"), available at <http://www.nytimes.com/2010/09/21/us/politics/21money.html?pagewanted=all>. And, political spending by these nonprofits has grown exponentially. See Center for Responsive Politics Study (showing that independent expenditures and electioneering communications by 501(c)s rose 42% after *Citizens United* from \$0 in 2006 to \$134,432,526 in 2010), available at <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

The sponsors of independent expenditures have been able to do what WTP did: organize themselves outside the campaign finance laws; seek funds for

general political activity with the assurance that no one "will ever know you helped make this program possible," Pet. App. 15a; and make independent expenditures without disclosing any donors.<sup>2</sup> Thus, a company can influence elections and avoid public scrutiny by giving to a nonprofit organization like WTP, ostensibly to support its general activities. See Luo & Strom, *supra* (reporting that many companies financing political speech through independent expenditures "are doing so through 501(c) organizations, as opposed to directly sponsoring advertisements themselves"). The nonprofit organization can then use the company's money to make independent expenditures, disclose only its spending, and identify none of its donors, allowing the donor – whether an individual or a major corporation – to remain anonymous. While the identities of donors are unknown to the public, by contrast, the donors can ensure that their identities and spending are known to the candidates they support and often attempt to influence.

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<sup>2</sup> Federal Election Commission ("FEC") rules curtailed even further the disclosure made by sponsors of electioneering communications, requiring them to disclose only those donors who gave for the specific purpose of "furthering" a particular expenditure. On March 30, 2012, a D.C. District Court judge found that these regulations impermissibly narrowed the disclosure requirements mandated by Congress in the BCRA. *Van Hollen v. Fed. Election Comm'n*, -- F.Supp.2d --, 2012 WL 1066717, at \*1 (D.D.C. Mar. 30, 2012). That decision is on appeal.

The issues of disclosure and accountability raised in the aftermath of *Citizens United* are not limited to corporations like WTP that were established to operate with minimal or no corporate disclosure. Many of the same issues are implicated by the realities of the form of ownership of large, publicly traded corporations. The fundamental objective of a campaign finance disclosure regime is, of course, to assist the public in identifying the authors of the speech distributed in the form of political messages. Yet,

shareholders in large publicly traded corporations . . . number in the thousands and are not a static set of identifiable human actors. They are often institutional, short-term investors, which change frequently and add layers of distance in terms of decisionmaking and monitoring from the humans who invested their capital.

Elizabeth Pollman, *Reconceiving Corporate Personhood*, at 38 (Dec. 31, 2010), available at <http://ssrn.com/abstract=1732910>.

The Court in *Citizens United* assumed that abuse could be "corrected by shareholders 'through the procedures of corporate democracy.'" 130 S. Ct. at 911 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)). In fact, institutional investors presently own more than two-thirds of the corporate

stock in the top 1,000 United States firms and own it on behalf of plan participants or shareholders. See Jennifer S. Taub, *Money Managers In The Middle: Seeing and Sanctioning Political Spending After Citizens United*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 443, 462 (2012). They are legally constrained from advancing the political preferences of their shareholders or beneficiaries, and in any event, have no means of assessing them. Shareholders invest in publicly traded companies primarily to make money—thus, they "do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion." *Bellotti*, 435 U.S. at 805 (White, J., dissenting).

When the managers of a publicly traded company choose to finance, either directly or indirectly, an independent expenditure campaign, it is difficult, if not impossible, to identify whose political interests are being advanced. The managers are ostensibly barred from pursuing their own political interests,<sup>3</sup> but at the same time lack the capacity to pursue the

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<sup>3</sup> Shareholders are largely skeptical that this bar is effective. See Jeanne Cummings, *Investors Seek Clarity on Campaign Giving*, WALL ST. J., Apr. 5, 2006 (citing 2006 survey by Mason-Dixon Polling & Research in which "[n]early three-quarters of [shareholder] respondents agreed that corporate giving is often aimed at advancing the private interests of executives rather than the company's interests"), available at <http://online.wsj.com/article/SB114419178325217080.html>.



political interests of all of the shareholders or their beneficiaries. Thus, when choosing to make a political expenditure, a manager of a widely held company must base the decision on his or her business judgment of what is in the financial interest of the company's shareholders generally. The business judgment rule then shields the manager from being held to account for the political consequences of that decision. See Taub, *supra* at 468. Identifying actual people on whose behalf the company is politically speaking is impossible. See Jessica A. Levinson, *We the Corporations? The Constitutionality of Limitations on Corporate Electoral Speech After Citizens United*, 46 U.S.F.L. REV. 307, 333-34 (2011). The larger political interests of real people gets subsumed into the narrower economic interest of the corporate entity.

Consequently, when a corporation uses treasury funds rather than funds voluntarily contributed by individuals or approved by shareholders to make a political expenditure, it is not the act of an individual or an association of individuals. It is a corporate act motivated exclusively by a corporate purpose for which no individual can be held politically accountable. In this context, it cannot be said that the corporation "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916.

That an association of individuals that chooses to participate in the political process is incorporated does not, by itself, pose a risk to the electoral system. The threat comes when the corporate form enables those individuals to avoid disclosure and accountability and forces others to support political causes to which they object.<sup>4</sup> This is in fact what has occurred in the wake of the Court's decision in *Citizens United*. The federal elections that have followed have been rife with political spending that is difficult if not impossible to trace and does not reflect the individual choices of the shareholders whose association gives rise to the corporation's right to speak. See *id.* at 904, 911 (describing corporations as "associations of citizens" and stating that there was "little evidence of abuse that cannot be corrected by shareholders" through corporate democracy). This increasing lack of accountability and personal responsibility for political spending seriously threatens the integrity of our elections and our democracy.

The loss of disclosure and accountability comes at a great cost. It exposes our elections and democratic institutions to the particularly corruptive influence of secret, unaccountable money. The spenders of these huge sums may avoid being held to account,

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<sup>4</sup> To compare, federal law permits associations of individuals organized as partnerships to make contributions, but the contributions are then attributed to both the partnership and to each partner individually. 11 C.F.R. § 110.1(e).

but nothing prevents them from seeking credit from those officials whose favor they seek.

**II. The Court Should Reaffirm That Citizens United Permits Congress And State Legislatures To Establish Disclosure Requirements For Corporate Independent Expenditures**

As described, *amici* urge the Court to deny the petition for a *writ of certiorari*. But, if the Court grants the petition, it should ultimately issue an opinion – after full briefing and argument – emphasizing that nothing in *Citizens United* precludes Congress and state legislatures from enacting laws that ensure meaningful disclosure of corporate independent expenditures.

This Court has long recognized the power of the states and Congress to legislate to protect elections against the improper use of money and influence. See U.S. CONST., art. I, § 4, cl. 1 (empowering State legislatures to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to alteration by Congress)<sup>5</sup>;

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<sup>5</sup> The power conferred by the Election Clause is "comprehensive," authorizing regulations "not only as to times and places," but also the "protection of voters, [and] prevention of fraud and corrupt practices . . . in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the

*Burroughs v. United States*, 290 U.S. 534, 545 (1934) (holding Congress "undoubtedly" possesses the power "to pass appropriate legislation to safeguard [the election of the President and Vice-President] from the improper use of money to influence the result . . . as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption"). See also *United States v. Harriss*, 347 U.S. 612, 625 (1954) (holding Congress may legislate to obtain "information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose" to determine "who is being hired, who is putting up the money, and how much").

*Citizens United* did not divest the states or Congress of these powers. To the contrary, the Court strongly reaffirmed them when it rejected 8-1 the petitioner's challenge to the Bipartisan Campaign Reform Act's disclaimer and disclosure requirements. *Citizens United*, 130 S. Ct. at 913-14. And, six months later, in *Doe v. Reed*, the Court again underscored the importance of the government's interest "in preserving the integrity of the electoral process," this time upholding against First Amendment challenge a law that provided for the public release of Washington State referendum petitions, including the names and addresses of all

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fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

who sign them. 130 S. Ct. 2811, 2815, 2819 (2010). See also *id.* at 2837 (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."); *Randall v. Sorrell*, 548 U.S. 230, 265 (2006) (Kennedy, J., concurring) (recognizing the rise of entities created for political influence "which are as much the creatures of law as of traditional forces of speech and association" and "can manipulate the system and attract their own elite power brokers, who operate in ways obscure to the ordinary citizen").<sup>6</sup>

Although this body of case law should leave no question about the ability of Congress and the states to enact legislation ensuring the disclosure of independent corporate contributions, some Members of Congress have opposed such legislation on the ground that disclosure requirements would conflict

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<sup>6</sup> Central to the Montana Supreme Court's decision below was its finding that "[o]rganizations like WTP that act as conduits for anonymous spending by others represent a threat to the 'political marketplace.'" Pet. App. 16a (quoting *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986)). WTP refused to disclose information about its operation, so it was "difficult" for the Montana Supreme Court to determine how it was impacted by the Montana law. *Id.* Based on the record before it, the Court found that none of the corporate plaintiffs were actually burdened by the law, which promotes accountability and transparency and ensures that the political speech in Montana's political marketplace can be traced back to identifiable sources.

with *Citizens United*. In 2010, majorities of Members of Congress in each chamber correctly saw that, without legislation, there would be no real way for the public "to hold corporations and elected officials accountable for their positions and supporters," or for shareholders to "determine whether their corporation's political speech advances the corporation's interest in making profits." *Citizens United*, 130 S. Ct. at 916. The DISCLOSE Act was introduced to restore this transparency to the system. See H.R. 5175, 111th Cong. (2010). Its central provision would have required corporations, unions, and other nonprofit organizations to disclose donors above fixed thresholds when making independent expenditures or electioneering communications, or when transferring funds to others who make them. See *id.* The bill passed the House on a vote of 219-206. 156 Cong. Rec. H4828 (daily ed. June 24, 2010). However, it failed to reach a vote in the Senate on a party-line filibuster, with 59 Democratic and Independent votes to proceed, and 39 Republican votes against cloture. See 156 Cong. Rec. S7388 (daily ed. Sep. 23, 2010).

The opposition to enhanced disclosure – and specifically, the opponents' citation of *Citizens United* as a basis for rejection – demonstrates the serious challenges Congress faces in fashioning and implementing the type of disclosure regime for corporate independent spending that the Court, in *Citizens United*, assumed would exist. For example,



in speaking against the DISCLOSE Act, Representative Pence (Indiana) asserted that requiring "identifying disclaimers" by corporations engaging in independent expenditures would "suppress speech by those who choose to speak out through associations" and "set[] back the freedoms affirmed . . . by the Supreme Court [in *Citizens United*]." 156 Cong. Rec. H4806 (daily ed. June 24, 2010). Representative Smith (Texas) similarly objected that the Act's disclosure requirements "would unconstitutionally limit the amount of information that organizations can include in ads stating their political opinions" and "unconstitutionally require the disclosure of an organization's donors, in violation of their right to free association." 156 Cong. Rec. H4799-4800 (daily ed. June 24, 2010). These statements sharply demonstrate the depth of the problem: legislators, misunderstanding the Court's position, are using *Citizens United* as a cudgel to beat back any effort to ensure the very transparency and accountability that was vital to the Court's determination to allow corporate independent expenditures.

Unless the Court speaks clearly, those who seek a regime characterized by anonymous donors and a lack of accountability will continue to use *Citizens United* to oppose any legislation aimed at establishing disclosure obligations. The Court can use the opportunity of this case to affirm that those who seek to deny the voting public and concerned

shareholders of knowledge that enables them to exercise their rights and responsibilities respectively as citizens and stewards of their own property will find no support in the decisions of this Court. *Amici* believe that transparency and accountability are fully compatible with our democratic values; in fact, they are the foundation on which our democracy rests. *Amici*, as does the respondent, seek to assure that foundation is not eroded and transparency and accountability remain essential features of campaign financing in this country.

Accordingly, *amici* requests that the Court deny the petition for a *writ of certiorari*. But, if the Court grants the petition, *amici* urge the Court to affirm – after full briefing and argument – that *Citizens United* does not prevent Congress and the states from passing legislation to fill this void in disclosure laws. Such a message can only help ensure, as the Court put it, that the electorate may "make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916.

## CONCLUSION

The Court's decision in *Citizens United* to permit corporate independent expenditures reaffirms the long-standing, compelling interests in ensuring disclosure, transparency, and accountability in the electoral process. But instead of reinforcing and promoting these interests, *Citizens United* is being

misapplied and misused as an obstacle to them. Because the decision below is consistent with these interests, the Court should deny the petition for a writ of certiorari. But, if the Court grants the petition, it should, after full briefing and argument, affirm that *Citizens United* permits legislation requiring disclosure and accountability for corporate independent expenditures. That result will achieve the Court's own clearly stated objective of ensuring "disclosure [that] permits citizens and shareholders to react to the speech of corporate entities in a proper way," and "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**

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**In The  
Supreme Court of the United States**

AMERICAN TRADITION PARTNERSHIP, INC., F.K.A.  
WESTERN TRADITION PARTNERSHIP, INC., ET AL.,

*Petitioners,*

v.

STEVE BULLOCK, ATTORNEY GENERAL  
OF MONTANA, ET AL.,

*Respondents.*

On Petition For A Writ Of Certiorari To  
The Supreme Court of Montana

**BRIEF OF WALTER DELLINGER  
AND JAMES SAMPLE  
AS AMICI CURIAE  
IN SUPPORT OF RESPONDENTS' OPPOSITION  
TO SUMMARY REVERSAL**

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## QUESTION PRESENTED

Whether summary reversal is appropriate in a case where the Supreme Court of a State sought to apply the new constitutional holding in *Citizens United* to a detailed factual record, grappling with significant open questions that were not directly resolved in that decision and which would benefit not only from further consideration by this Court but also from further percolation in the lower courts.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I.    THE MONTANA SUPREME COURT MAJORITY AND DISSENT EACH TRIED FAITHFULLY TO APPLY THIS COURT'S PRECEDENT TO THE RECORD.	4
II.   FURTHER PERCOLATION IN THE LOWER COURTS WILL FOSTER THOUGHTFUL RESOLUTION OF QUESTIONS LEFT UNANSWERED BY <i>CITIZENS UNITED</i> , WHICH AT LEAST REQUIRE PLENARY CONSIDERATION BY THIS COURT.	10
III.  THE CASES CITED IN <i>CITIZENS UNITED</i> 'S <i>AMICUS</i> BRIEF DO NOT SUPPORT SUMMARY REVERSAL IN THIS CASE.	12
CONCLUSION	16

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Arizona v. Evans</i> , 514 U.S. 1 (1995)	11
<i>Arkansas v. Sullivan</i> , 532 U.S. 769 (2001)	15
<i>Ashland Oil, Inc. v. Caryl</i> , 497 U.S. 916 (1990)	14
<i>Bluman v. FEC</i> , —U.S.—, 132 S. Ct. 1087 (2012)	9
<i>Bobby v. Mitts</i> , —U.S.—, 131 S. Ct. 1762 (2011)	14
<i>Brousseau v. Haugen</i> , 543 U.S. 194 (2004)	14
<i>Brown ex rel. Brown v. Genesis Healthcare Corp.</i> , —S.E.2d—, No. 35494, 2011 WL 2611327 (W. Va. June 29, 2011)	3, 13
<i>California v. Beheler</i> , 463 U.S. 1121 (1983)	14
<i>California v. Carney</i> , 471 U.S. 386 (1985)	10
<i>Citizens United v. FEC</i> , —U.S.—, 130 S. Ct. 876 (2010)	<i>passim</i>
<i>Connally v. Georgia</i> , 429 U.S. 245 (1977)	15
<i>CSX Transp., Inc. v. Hensley</i> , 556 U.S. 838 (2009)	14, 15

## TABLE OF AUTHORITIES

	Page(s)
<i>El Vocero de Puerto Rico v. Puerto Rico</i> , 508 U.S. 147 (1993)	14
<i>Johnson v. Virginia</i> , 373 U.S. 61 (1963)	13
<i>Marmet Health Care Ctr., Inc. v. Brown</i> , —U.S.—, 132 S. Ct. 1201 (2012)	3, 12, 13
<i>McCray v. New York</i> , 461 U.S. 961 (1983)	12
<i>New York State Bd. of Elections v.</i> <i>López Torres</i> , 552 U.S. 196 (2008)	8
<i>Ohio v. Reiner</i> , 532 U.S. 17 (2001)	13
<i>Oregon v. Mathiason</i> , 429 U.S. 492 (1977)	14
<i>Personal PAC v. McGuffage</i> , No. 12-CV- 1043, 2012 WL 850744 (N.D. Ill. Mar. 13, 2012)	10
<i>Pennsylvania v. Bd. of Dirs. of City</i> <i>Trusts</i> , 353 U.S. 230 (1957)	13
<i>Republican Party of Minnesota v. White</i> , 536 U.S. 765 (2002)	7
<i>Rose v. Arkansas State Police</i> , 479 U.S. 1 (1986)	15
<i>Spears v. United States</i> , 555 U.S. 261 (2009)	3, 11, 15, 16
<i>Trustees of the Monroe Avenue Church</i> <i>of Christ v. Perkins</i> , 334 U.S. 813, 813 (1948)	13

## TABLE OF AUTHORITIES

	Page(s)
<i>Turner v. Dep't of Employment Security</i> , 423 U.S. 44 (1975)	15
<i>United States v. Danielczyk</i> , 791 F. Supp. 2d 513 (E.D. Va. 2011)	10
Other Authorities	
Ernest J. Brown, <i>The Supreme Court, 1957 Term—Foreword: Process of Law</i> , 72 HARV. L. REV. 77 (1958)	13, 14
BENJAMIN CARDOZO, <i>THE NATURE OF THE JUDICIAL PROCESS</i> (1921)	10
Samuel Estreicher & John E. Sexton, <i>New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study</i> , 59 N.Y.U. L. REV. 677 (1984)	11
RICHARD H. FALLON, JR. ET AL., <i>HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM</i> (6th ed. 2009)	3, 12
EUGENE GRESSMAN ET AL., <i>SUPREME COURT PRACTICE</i> (9th ed. 2007)	12, 14
Jurisdictional Statement, <i>Bluman v. FEC</i> , No. 11-275, 2011 WL 3919650 (Sept. 1, 2011)	9

## INTEREST OF *AMICI CURIAE*

*Amici* are professors and practitioners of law. Their interest in the Petition arises from a desire to promote fair procedures for practice before this Court and to encourage the sound development of constitutional law.\*

Walter Dellinger is a member of the faculty of the Duke University School of Law, leads the Harvard Law School Supreme Court and Appellate Practice Clinic, and is a partner in the appellate practice group at the law firm of O'Melveny & Myers LLP. He served as acting Solicitor General for the 1996-97 Term of this Court, and as a law clerk to Justice Hugo L. Black for the 1968-69 Term of this Court.

James Sample is a member of the faculty of the Hofstra Law School. His teaching and scholarship concern issues related to democracy, with a focus on judicial elections. He recently authored *Lawyer, Candidate, Beneficiary, and Judge? Role Differentiation in Elected Judiciaries*, U. CHI. LEGAL F. (2011), and coauthored *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE* (2010).

## SUMMARY OF ARGUMENT

This case is not an appropriate candidate for summary reversal. The case drew two dozen *amici* to the Supreme Court of the State of Montana and resulted

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\*The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae's* intention to file this brief. Letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund preparation of this brief.



in three opinions—totaling eighty pages—that disagreed sharply over the inferences to be drawn from the record and the proper application of the rule for evaluation of independent expenditures in elections for political office, as announced in this Court's *Citizens United* decision.

To be sure, summary reversal may be useful when a lower court overtly disregards this Court's definitively settled precedent. In such cases, summary reversal can help ensure consistency in the law and respect for this Court's precedents. But this is not such a case.

1. The Petition and *amicus* briefs by Citizens United (the entity) and the U.S. Chamber of Commerce urge summary reversal based on a caricature of the Montana Supreme Court's Opinion, suggesting that the majority of that court overtly disregarded the rule of law set forth in this Court's decision in *Citizens United v. FEC*, —U.S.—, 130 S. Ct. 876 (2010). Reading those documents leaves the incorrect impression that the Montana Supreme Court was attempting to apply an irrational form of geographic exceptionalism. In reality, both the majority and the dissenters in the Montana Supreme Court applied the holding announced in *Citizens United* to the record before them to evaluate whether the state law restriction at issue was narrowly tailored to serve a compelling state interest. To be sure, the majority and the dissent clashed sharply over the application of that rule to the record in the case. But it is neither correct nor reasonable to say that the Montana Supreme Court was thumbing its nose at this Court rather than conducting a good faith application of the governing precedent in light of the particular interests advanced by the State, the record evidence and the

contours of the statutory provision at issue. See Part I, *infra*.

2. In *Citizens United* this Court left significant questions unanswered, as is evident from the divergent analysis of the Montana Supreme Court's majority and dissent. Debate and discussion among the lower courts will help identify and inform these open questions. Stopping that process in its tracks by summarily reversing a decision of a State Supreme Court just two years after deciding *Citizens United* will impede thoughtful development of the law by the lower courts. See Part II, *infra*.

3. The "bitter medicine of summary reversal" (*Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal)) should be reserved for decisions so clearly contrary to well-settled precedent of this Court as to constitute a manifest and grievous error plainly not worth the time required for briefing and argument on the merits. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1480 (6th ed. 2009). The cases listed in *Citizens United*'s *amicus* briefs fit that description. For example, in *Marmet Health Care Center, Inc. v. Brown*, —U.S.—, 132 S. Ct. 1201 (2012), the West Virginia Supreme Court expressly refused to apply this Court's construction of the Federal Arbitration Act, describing this Court's decision as "tendentious," and "created from whole cloth." *Id.* at 1203 (citation omitted) (quoting *Brown ex rel. Brown v. Genesis Healthcare Corp.*, —S.E.2d—, No. 35494, 2011 WL 2611327, at \*18 (W. Va. June 29, 2011)). This Court summarily and unanimously reversed. *Id.* at 1204. The Montana Supreme Court decision at issue here is starkly different from such cases. See Part III, *infra*.

In sum, in the circumstances presented here, summary reversal of the Montana Supreme Court would represent a sharp departure from this Court's traditional practices, cut off development of the law and stand as an unwarranted rebuke to the high court of a coordinate sovereign.

## ARGUMENT

### I.

#### **THE MONTANA SUPREME COURT MAJORITY AND DISSENT EACH TRIED FAITHFULLY TO APPLY THIS COURT'S PRECEDENT TO THE RECORD.**

The Petition for Certiorari does not fairly characterize the decision of the Montana Supreme Court, ten times claiming that the majority simply "refused" to be bound by this Court's decision in *Citizens United*.<sup>1</sup> Two *amicus* briefs follow Petitioners' lead, claiming that summary reversal is needed to "disapprove the Montana Supreme Court's transparent attempt to evade this Court's clear mandate" (*Citizens United Amicus* Br. 3), and to "remind Montana of the binding effect of this Court's decisions" (U.S. Chamber *Amicus* Br. 5).

Repetition is not a substitute for accuracy. No fair reading of the Montana Supreme Court's majority and dissenting opinions supports Petitioners' caricature of a renegade court stubbornly refusing to apply the First Amendment. Contrary to the Petitioners' assertion that the Montana Supreme Court "refused

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<sup>1</sup>Petrn. 8 ("unjustified refusal of the court below to follow" *Citizens United*), 10 ("refusal to adhere"), 10 ("refused to follow"), 11 ("refused to apply"), 12 ("refused to apply"), 13 ("refused to abide"), 19 ("refusal to comply"), 21 ("refusing to follow"), 23 ("refusing to follow"), 26 ("refusal to be bound").

to apply this Court's First Amendment strict-scrutiny analysis" (Petn. 12), the Montana Supreme Court majority and dissent both began from the same premise—that a restriction that burdens political speech may be upheld only if the record demonstrates that the restriction "furthers a compelling state interest and is narrowly tailored to that interest." App. 13a. The Montana Supreme Court majority and dissent then assessed whether the State had met that high burden on the specific facts presented. The majority and the dissenting opinions each strove to apply with fidelity the rule announced in *Citizens United* to the record as they saw it. Both the majority and dissenting opinions reflect significant analysis of the meaning and scope of *Citizens United*. App. 10a-13a; App. 33a-35a (Baker, J., dissenting); App. 49a-62a (Nelson, J., dissenting). These reasoned opinions reach different conclusions on such critical questions as:

- Whether the burden of establishing a compelling state interest was met where the record demonstrated a particularized need to combat corruption or encourage the full participation of the electorate—as found by the Montana Supreme Court majority (see App. 12a-13a)—or whether *Citizens United* means that no government interest can ever justify restrictions on corporate political expenditures, as urged by the Montana Supreme Court dissenters (see, e.g., App. 40a-41a (Nelson, J., dissenting));
- Whether spending through a segregated fund can ever be a sufficient alternative to direct corporate spending if the state's procedures for formation of the fund are not burdensome to the corporation (see App. 10a-11a); and

- Whether the state's interest in the integrity of the judicial process implicates special concerns that arise in the context of judicial elections, which were not before this Court in *Citizens United* (see App. 27a-31a).

Based on the record evidence concerning Montana's unique history of political corruption, the majority held that Montana had a compelling interest in preserving the integrity of its election process at the time the statute was enacted (App. 25a), and that the State had never "los[t] the power or interest sufficient to support the statute," given that "[i]ssues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government." App. 26a. The dissent disagreed on this point. It acknowledged this Court's "concern" in *Citizens United* about improper influence from independent expenditures and its desire to give weight to legislative efforts that "seek to dispel either the appearance or the reality of these influences." App. 44a (quoting *Citizens United*, 130 S. Ct. at 911). But the dissenters concluded that as a matter of law, "independent expenditures, including those made by corporations, do not [ever] give rise to corruption or the appearance of corruption." App. 59a (quoting *Citizens United*, 130 S. Ct. at 909) (bracketed material added).

The majority also found that Montana has a compelling interest in encouraging the full participation of the electorate. Data in the record showed that Montana citizens "generally support candidates with modest campaign donations," and the majority con-



cluded that “[w]ith the infusion of unlimited corporate money in support of or opposition to a targeted candidate, the average citizen[-sponsored] candidate would be unable to compete against the corporate-sponsored candidate, and Montana citizens, who for over 100 years have made their modest election contributions meaningfully count would be effectively shut out of the process.” App. 26a-27a. The dissent acknowledged the legitimacy of a state’s “desire to protect the ability of citizen candidates to compete, and the ability of citizens to meaningfully participate and be heard in the political process,” but considered this reasoning to be “essentially a repackaged version of the antidistortion rationale” rejected in *Citizens United*. App. 75a. (The dissent did not discuss why the “essence” of a state interest in meaningful participation was the same as the “essence” of a state interest in preventing distortion among speakers, and the sameness of the two interests is not facially obvious—meaningful participation seems process-oriented, while antidistortion may suggest a qualitative evaluation of the speakers’ respective messages.)

Finally, the majority found that the record supported the existence of a compelling interest in protecting and preserving Montana’s system of elected judges (App. 27a-31a), which interest would doom Petitioners’ facial challenge to the statute. The Montana Supreme Court dissenters disagreed, predicting that this Court’s decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) “strongly indicates that the interests cited by the Court here are insufficient for prohibiting corporate speech in judicial elections.” App. 79a. (More recently, however, this Court has in fact suggested that states may have special interests in avoiding a



system of judicial elections that “leaves judicial selection to voters uninformed about judicial qualifications, and places a high premium upon the ability to raise money.” *New York State Bd. of Elections v. López Torres*, 552 U.S. 196, 206 (2008).)

The Petition points out that Justice Stevens’ dissent in *Citizens United* raised concerns about corporate and union independent expenditures in judicial elections (Petn. 18), but Petitioners cannot avoid the fact that judicial elections were not before this Court in *Citizens United*. Petitioners’ assertion that the Court gave no “indication that the [judicial election] question remained open” (*id.*) is unpersuasive. The Court gave no indication one way or the other of how it would resolve a case involving the State’s interests in managing judicial elections. It is difficult to imagine that the Court intended to foreclose evaluation of whether judicial elections present compelling government interests in a case that did not involve judicial elections. Certainly the Court’s *silence* would not lead a reasonable observer to think the issue had been foreclosed, nor that the members of the highest court of a state that has chosen to select its judiciary by election would be “refusing” to follow *Citizens United* by having a vigorous debate about the state’s interest in such elections under the standards set forth by this Court only two years earlier.

In sum, five members of the Montana Supreme Court concluded that under *Citizens United* the particular interests presented in the record before that Court were compelling. Two members of the Montana Supreme Court disagreed with the majority’s analysis of the record and the inferences to be drawn from the record. But regardless of which opinion was ultimately correct on these matters, it is grossly inaccurate to say—as the Petition and its

*amici* do—that the Montana Supreme Court simply “rejected,”<sup>2</sup> “disregard[ed],”<sup>3</sup> or “refused to follow”<sup>4</sup> this Court’s decision in *Citizens United*.

At bottom, Petitioners view *Citizens United* as such a sweeping decision that “[t]he facts are irrelevant.” Petn. 32 (emphasis omitted). As far as Petitioners are concerned, no “cognizable governmental interest justifies banning corporate independent expenditures”—ever. *Id.* Petn. 32-33. Earlier this Term, this Court rejected such extremism in *Bluman v. FEC*, No. 11-275. There, the plaintiffs challenged the federal ban on independent election expenditures by foreign citizens, including corporations. In its brief to this Court, the plaintiffs argued that the court “meant what it said” in *Citizens United* that the First Amendment “offers no foothold for excluding any category of speaker. . . .” Jurisdictional Statement, *Bluman v. FEC*, No. 11-275, 2011 WL 3919650, at \*11-\*12 (Sept. 1, 2011) (quoting *Citizens United*, 130 S. Ct. at 929 (Scalia, J., concurring)). This Court disagreed, summarily affirming a three-judge court’s rejection of that attempt to over-read *Citizens United*. *Bluman v. FEC*, —U.S.—, 132 S. Ct. 1087 (2012). Petitioners similarly over-read *Citizens United*.

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<sup>2</sup>Petn. 13.

<sup>3</sup>*Citizens United Amicus Br.* 4.

<sup>4</sup>See *supra* note 1.

## II.

**FURTHER PERCOLATION IN THE LOWER  
COURTS WILL FOSTER THOUGHTFUL  
RESOLUTION OF QUESTIONS LEFT  
UNANSWERED BY *CITIZENS UNITED*,  
WHICH AT LEAST REQUIRE PLENARY  
CONSIDERATION BY THIS COURT.**

As the above discussion (and the differing opinions of the Montana Supreme Court Justices) demonstrates, *Citizens United* left important questions unanswered and the law in a state of development. Indeed, the Petition itself acknowledges that at least one other court has recognized open questions about “the parameters of *Citizens United* as applied to political climates of individual states.” Petn. 22-23 (quoting *Personal PAC v. McGuffage*, No. 12-CV-1043, 2012 WL 850744, at \*4 (N.D. Ill. Mar. 13, 2012)); see also *United States v. Danielczyk*, 791 F. Supp. 2d 513 (E.D. Va. 2011) (on rehearing, narrowing extent to which the court thought that *Citizens United* renders federal election law unconstitutional) (appeal pending).

“To identify rules that will endure, [the Court] must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law. Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves ‘whatever is pure and sound and fine.’” *California v. Carney*, 471 U.S. 386, 400-01 (1985) (Stevens, J., dissenting) (footnote omitted) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921)).

As one “perceptive study” (*id.* at 398) of this Court’s docket explained:

Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable. (Samuel Estreicher & John E. Sexton, *New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 677, 681, 716 (1984))

This principle applies with full force here. Summarily reversing the Montana Supreme Court's decision just two years after deciding *Citizens United* would prematurely and artificially curtail the critical "period of exploratory consideration and experimentation by lower courts." *Id.*; see also *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal) ("[T]his is exactly the sort of issue that could benefit from further attention" by lower courts); see *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court"). And summary reversal would prevent the "various States [from] serv[ing] as laboratories in

which the issue receives further study before it is addressed by this Court.” *McCray v. New York*, 461 U.S. 961, 961-63 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari).

In short, summary reversal would impede thoughtful development of the law on “an issue of national importance.” *Citizens United Amicus Br.* 12.

### III.

#### **THE CASES CITED IN CITIZENS UNITED’S AMICUS BRIEF DO NOT SUPPORT SUMMARY REVERSAL IN THIS CASE.**

*Amicus* Citizens United (the entity) urges the Court to reverse summarily. Summary reversal “usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time.” EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 344 (9th ed. 2007) (hereafter, “*STERN & GRESSMAN*”). One authority has suggested that the Court should act summarily “if the lower court has committed a manifest and grievous error in a case plainly not worth the time required for full briefing and argument.” RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1480 (6th ed. 2009).

For the reasons explained in Part I, *supra*, this is not a case like *Marmet Health Care Center, Inc. v. Brown*, —U.S.—, 132 S. Ct. 1201 (2012) (cited at *Citizens United Amicus Br.* 15), in which the state Supreme Court thumbed its nose at this Court’s definitive construction of a federal statute, describing this Court’s interpretation of the Federal



Arbitration Act as “tendentious,” and “created from whole cloth.” *Id.* at 1203 (quoting *Brown ex rel. Brown v. Genesis Healthcare Corp.*, —S.E.2d—, No. 35494, 2011 WL 2611327, at \*18 (W. Va. June 29, 2011) (*rev’d per curiam*)).

Nor, for the reasons explained in Part II, *supra*, is this a case like *Ohio v. Reiner*, 532 U.S. 17 (2001) (cited at Citizens United *Amicus* Br. 15), where the relevant law had been completely and definitively settled by this Court’s prior rulings and no further percolation or consideration would be useful. *Id.* at 21 (reversing Ohio Supreme Court’s holding that forbade a witness to invoke the Fifth Amendment privilege against self-incrimination because he had denied culpability, in light of this Court’s definitive holding that “one of the Fifth Amendment’s basic functions is to protect *innocent men* who otherwise might be ensnared by ambiguous circumstances”) (citation, ellipses and internal quotation marks omitted; emphasis added).

The remaining cases cited in Citizens United’s *Amicus* Brief are similarly inapposite.

Three concerned civil-rights era challenges to racial discrimination, in an era in which some state officials (and occasionally state courts) openly defied this Court’s precedents. See *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (*per curiam*); *Pennsylvania v. Bd. of Dir. of City Trusts*, 353 U.S. 230, 231 (1957) (*per curiam*); *Trustees of the Monroe Avenue Church of Christ v. Perkins*, 334 U.S. 813, 813 (1948) (*per curiam*). (Notably, even during this period of open defiance, commentators criticized the use of summary reversal, and the Court later reduced its reliance on the practice. See, e.g., Ernest J. Brown, *The Supreme Court, 1957 Term—Foreword: Process*



of Law, 72 HARV. L. REV. 77 (1958); STERN & GRESSMAN, *supra*, at 350 n.106.)

Several others involved statutes or jury instructions that were either literally or substantively identical to ones addressed in prior decisions by this Court, so that the Court had no need for full briefing and argument. See *Bobby v. Mitts*, —U.S.—, 131 S. Ct. 1762, 1763-64 (2011) (per curiam) (reversing where the Court had decided the relevant question in a case from the prior Term involving “virtually the same Ohio jury instructions”); *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 918 (1990) (per curiam) (deciding only whether to retroactively apply the Court’s prior decision invalidating the same state statute at issue); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (considering a challenge to a territorial law that had been modeled on a state law previously struck down by the Court).

Still others concerned topics well trodden in this Court’s case law and lower court opinions that self-evidently deviated from the applicable black letter law. See *California v. Beheler*, 463 U.S. 1121, 1123-24 (1983) (per curiam) (reversing state court’s ruling, in a factual context “remarkably similar” to one the Court had already addressed in a prior summary reversal, on what constituted “custody” for purposes of Miranda warnings); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam) (summary reversal referred to in *Beheler*); *Brousseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam) (reversing Ninth Circuit’s decision that reflected a “clear misapprehension of the qualified immunity standard”).

In the remaining decisions, the lower court’s decision was so flatly contrary to this Court’s precedents that the error was too glaring to ignore. See *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841-42 (2009)

(per curiam) (lower court refused to give a jury instruction despite this Court's statement in prior decision that such an instruction was available); *Spears v. United States*, 555 U.S. 261, 263-64 (2009) (per curiam) (reversing lower court's refusal to allow a district court to depart from Sentencing Guidelines, despite this Court's precedent declaring the Guidelines to be advisory); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (reversing the Arkansas Supreme Court's claim that "there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court . . ."); *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986) (per curiam) (reversing where state court "fail[ed] to see a supremacy clause argument" that was self-evident from the face of federal and state statutes); *Connally v. Georgia*, 429 U.S. 245, 246, 250 (1977) (per curiam) (reversing conviction based on a warrant issued by a justice of the peace who was financially incentivized to approve warrants); *Turner v. Dep't of Employment Security*, 423 U.S. 44, 46 (1975) (per curiam) (reversing state ruling founded on presumption that pregnancy incapacitates women that was "virtually identical" to presumption previously held unconstitutional).

The Montana Supreme Court's decision here is not like any of these decisions. The Montana Supreme Court did not defy this Court's precedents. The statute at issue is different in several respects from the federal statute struck down in *Citizens United*, and neither served as the model or template for the other. Nor is the doctrine established by *Citizens United* so comprehensive and settled that, on the facts of this case, the decision can only be viewed as a grievous and manifest error, reflecting "error so

apparent as to warrant the bitter medicine of summary reversal." *Spears*, 555 U.S. at 268 (Roberts, C.J., dissenting).

Indeed, not one of the summary reversals cited by Citizens United involved a case that (1) drew two dozen *amici* to the Supreme Court of a coordinate sovereign, (2) involved a materially different statute than the statute at issue in the allegedly controlling cases or (3) resulted in three opinions that agreed on the legal standard that should be applied, but clashed sharply over the application of that standard to the record in the case and the inferences to be drawn from that record.

### CONCLUSION

This Court should not summarily reverse the decision of the Supreme Court of Montana.

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May 18, 2012.

**AMICUS  
CURIAE  
BRIEF**

IN THE  
**Supreme Court of the United States**

AMERICAN TRADITION PARTNERSHIP, INC., F.K.A.  
WESTERN TRADITION PARTNERSHIP, INC., ET AL..  
PETITIONERS

v.

STEVE BULLOCK, ATTORNEY GENERAL  
OF MONTANA ET AL.

PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF MONTANA

**BRIEF OF THE ELEVENTH AMENDMENT MOVEMENT  
(TEAM) AS AMICUS CURIAE IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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# TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF THE ARGUMENT.....	1
ARGUMENT.....	7
I. THE SUPREME COURT LACKS JURISDICTION OF THIS CASE UNDER ARTICLE III AND THE 10TH AND 11TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.....	7
II. THE <i>YOUNG</i> FICTION DOES NOT APPLY IN THIS CASE BECAUSE PETITIONERS SUED ARMS OF THE STATE AND OFFICERS IN THEIR OFFICIAL CAPACITY IN VIOLATION OF THE ELEVENTH AMENDMENT .....	31
CONCLUSION .....	36
APPENDIX	
ELEVENTH AMENDMENT.....	37



## TABLE OF AUTHORITIES

Page

## CASES

<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	<i>passim</i>
<i>Am. Fire &amp; Cas. Co. v. Finn</i> , 341 U. S. 6 (1951).....	26
<i>Am. Tradition P'ship, Inc. v. Bullock</i> , 565 U.S. ___, 132 S.Ct. 1307 (February 17, 2012) .....	32
<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985).....	11, 18
<i>Board of Trs. of the Univ. of Alabama v. Garrett</i> , 531 U. S. 356 (2001) .....	12, 15, 16
<i>Cent. Virginia Cmty. Coll. v. Katz</i> , 546 U.S. 356 (2006).....	12, 27
<i>Chisholm v. Georgia</i> , 2 U.S. (2 Dall.) 419 (1793) .....	5, 9
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	16
<i>Civil Rights Cases</i> , 109 U.S. 3 (1883).....	12
<i>Clark v. Barnard</i> , 108 U.S. 436 (1883).....	20
<i>Cohens v. Virginia</i> , 19 U.S. 264 (1821).....	33
<i>Coleman v. Court Of App. Of Md.</i> , 132 U. S. 1327 (2012).....	16
<i>College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.</i> , 527 U.S. 666 (1999).....	2, 12, 14
<i>Cory v. White</i> , 457 U.S. 85 (1982).....	28, 29
<i>Dellmuth v. Muth</i> , 491 US 223 (1989).....	18
<i>Dred Scott v. Sandford</i> , U.S. (19 How.) 393 (1857).....	9
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963).....	23
<i>Duhne v. New Jersey</i> , 251 U.S. 311 (1920).....	2
<i>Edelman v. Jordan</i> , 415 U. S. 651 (1974).....	11, 14, 28
<i>Ex Parte Ayers</i> , 123 U.S. 443 (1887).....	22, 34
<i>Ex Parte Young</i> , 209 U.S. 123 (1908).....	<i>passim</i>
<i>Fed. Mar. Comm'n v. South Carolina State Ports Auth.</i> , 535 U.S. 743 (2002) .....	<i>passim</i>
<i>Fitzpatrick v. Bitzer</i> , 427 U. S. 445 (1976).....	14
<i>Florida Dept. of State v. Treasure Salvors, Inc.</i> , 458 U.S. 670 (1982) .....	24
<i>Florida. Prepaid Postsecondary Educ. Expense Bd. v. College Sav.</i> , 527 U.S. 627 (1999).....	16

<i>Ford Motor Co. v. Dep't of Treas. of Indiana</i> , 323 U.S. 459 (1945).....	32
<i>Governor of Ga. v. Madrazo</i> , 1 Pet. 110 (1828).....	22, 31
<i>Great N. Life Ins. Co. v. Read</i> , 322 U. S. 47 (1944) .....	31
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890).....	passim
<i>Heart of Atlanta Motel v. United States</i> , 379 U.S. 241 (1964).....	13
<i>Hoffman v. Connecticut Dep't of Income Maint.</i> , 492 U.S. 96 (1989).....	18
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978) .....	35
<i>Idaho v. Coeur d'Alene Tribe of Idaho</i> , 521 U. S. 261 (1997).....	3, 32
<i>Irwin v. Dep't Of Veterans Affairs</i> , 498 U.S. 89 (1990).....	34
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966).....	13
<i>Kimel v. Florida Bd. of Regents</i> , 528 U.S. 62 (2000).....	16
<i>Lochner v. New York</i> , 198 U.S. 45 (1905) .....	passim
<i>Murray v. Wilson Distilling Co.</i> , 213 U.S. 151 (1909) .....	23
<i>Nevada Dep't. of Human Res. v. Hibbs</i> , 538 U. S. 721 (2003).....	16
<i>Northern Ins. Co. v. Chatham Cnty</i> , 547 U.S. 189 (2006).....	31
<i>Parden v. Terminal R. Co.</i> , 377 U. S. 184 (1964).....	13, 21
<i>Pennhurst State Sch. &amp; Hosp. v. Halderman</i> , 465 U.S. 89 (1984).....	passim
<i>Pennsylvania v. Union Gas Co.</i> , 491 U. S. 1 (1989).....	25
<i>Plessy v. Ferguson</i> , 163 U. S. 537 (1896) .....	13
<i>Principality of Monaco v. Mississippi</i> , 292 U.S. 313 (1934).....	11
<i>Printz v. United States</i> , 521 U.S. 898 (1997) .....	12, 26
<i>Respublica v. Cobbet</i> , 3 U.S. (3 Dall.) 467 (1798) .....	10
<i>Santa Clara County v. S. Pac. R.R. Co.</i> , 118 U.S. 394 (1886).....	13
<i>Seminole Tribe v. Florida</i> , 517 U.S. 44 (1996) .....	3, 6, 11, 21
<i>Smith v. Reeves</i> , 178 U.S.436 (1900).....	31
<i>Sorrell v. IMS Health Inc.</i> , 131 U. S. 2653 (2011) .....	21
<i>Sossamon v. Texas</i> , 131 S. Ct. 1651 (2011).....	2, 34
<i>Tennessee v. Lane</i> , 541 U.S. 509 (2004).....	12, 16
<i>United States v. Georgia</i> , 546 U.S. 151 (2006).....	17

<i>United States v. Morrison</i> , 529 U. S. 598 (2000) .....	16
<i>Virginia v. Rives</i> , 100 U.S. 313 (1880) .....	14, 22
<i>Welch v. Texas Dep't of Highways &amp; Pub. Transp.</i> , 483 U.S. 468 (1987) .....	18
<i>Western Tradition P'ship v. Attorney General</i> , 363 MT 220 (2011) .....	32
<i>Wisconsin Dept. of Corr. v. Schacht</i> , 524 U.S. 381 (1998) .....	19
<i>Yarborough (The Ku Klux Cases)</i> , 110 U.S. 651 (1884) .....	12

## STATUTES

28 U.S.C. § 1257 .....	18
------------------------	----

## CONSTITUTIONAL PROVISIONS

11 <sup>th</sup> Amend. ....	<i>passim</i>
14 <sup>th</sup> Amend. ....	<i>passim</i>
Article III .....	8, 10, 11, 25

## OTHER AUTHORITIES

A. Blackmon, <i>Slavery by Another Name: The Re- Enslavement of Black Americans from the Civil War to World War II</i> (2009) .....	13
Clark, <i>The Eleventh Amendment And The Nature Of The Union</i> , 123 Harv. L. Rev. 1820 (2010) .....	10
Fuller, <i>Legal Fictions</i> 25 Ill. L. Rev. 363, 513, 877 (1930-31) .....	26
Polakoff, <i>The Politics of Inertia: The Election of 1876 and the End of Reconstruction</i> (1973) .....	18
W. A. LaBach, <i>The Supreme Court Fails Its First Test: Chisholm v. Georgia</i> (2009) .....	9

## INTEREST OF *AMICUS CURIAE*

With the parties' consent, *Amicus Curiae* files this brief in opposition to granting the petition for writ of certiorari.<sup>\*</sup>

*Amicus, The Eleventh Amendment Movement ("TEAM")* is a national non-partisan association dedicated to education, non-partisan advocacy and litigation to support the restoration and protection of fundamental special sovereign interests of the states as protected by the Eleventh Amendment of the United States Constitution. *Amicus* is interested in this suit by corporate petitioners against the state of Montana because, should their Petition for Certiorari be granted, it would violate fundamental principles of states rights and the immunity which inheres in the design of the Constitution, as exemplified by the Eleventh Amendment.

## SUMMARY OF THE ARGUMENT

It is well-established that Eleventh Amendment immunity bars the Supreme Court from entertaining a private suit against a state without its consent.<sup>1</sup>

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<sup>\*</sup>The parties were notified ten days prior to the due date of this brief of the intention to file and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

<sup>1</sup>See *Hans v. Louisiana*, 134 U.S. 1 (1890). Under the US Constitution, Article III, Sec 2 (e.g. *Employees v. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973) (Marshall, J. concurring)) as reinforced by the 11th Amendment's "affirmation that the

Montana has not given its consent to this suit in federal court.<sup>2</sup>

Since 1974 this Court has developed doctrine defining how the federal government may authorize private enforcement of federal law against the states. Enforcement Clause authority of 14<sup>th</sup> Amendment, Sec. 5, allows Congress to abrogate states' Eleventh Amendment immunity. As Justice Scalia held in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999), other than express waiver of its immunity by a state, the "only ... circumstances in which an individual may sue a State" now recognized by the Court is if "Congress ... authorize[d] such a suit in the exercise of its power to enforce the Fourteenth Amendment." No such

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fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III\* (*Pennhurst State Sch. & Hosp. v. Halderman*, 465 U. S. 89 (1984)), it is well-established that the "judicial power of the United States shall not be construed to extend" to a case brought by citizens of Montana against the State of Montana, without its consent. E.g. *Duane v. New Jersey*, 251 U.S. 311, 313 (1920) (in a claim concerning the Constitution the Supreme Court lacks constitutional "authority to entertain a suit brought by a citizen against his own State without its consent").

\*See Part I.B.3. "[I]t is elementary that even if a State has consented to be sued in its own courts ... a right would not exist ... to sue the State in a court of the United States." *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 172 (1909). *Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011) ("a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court."). Such waiver must be made "specifically applicable to federal court jurisdiction." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 (1985).



authorization by Congress applies to this case. See Part I.B.2.

The development of this exception rooted in the 14<sup>th</sup> Amendment of the Constitution has functionally served to displace an historical exception to the 11<sup>th</sup> Amendment immunity that finds no textual support in the Constitution, known as “the *Young* fiction.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U. S. 261 (1997) (Kennedy, J.) Part I.C.1. Justice Kennedy’s opinion in *Coeur d’Alene Tribe* is one of a series of decisions by this Court reinforcing the doctrinal underpinnings of the landmark decision in *Hans*. E.g. *Fed. Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002) (Thomas, J.); *Alden v. Maine*, 527 U.S. 706 (1999) (Kennedy, J.) (“*Alden*”); and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). These decisions have recently drawn into question the viability of any historical exception to 11<sup>th</sup> Amendment immunity not rooted in the Constitution.

By significantly developing and harmonizing 11<sup>th</sup> Amendment doctrine, these cases bring the previously much-criticized doctrine, [See Essential Information Brief (“EI Br.”) II, note 2.] closer to the text and historical antecedents of the 11<sup>th</sup> Amendment, and to relevant constitutional development after that Amendment. These cases teach that no branch of the federal government has authority to abrogate a state’s immunity from private non-consensual suit established by both the 11<sup>th</sup> Amendment and prior constitutional design, other than through valid exercise of Congress’ 14<sup>th</sup> Amendment enforcement powers.<sup>3</sup>

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<sup>3</sup>But see *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (5-4). As an exception to the general principle that Article I does not



"Eleventh Amendment immunity" bars this Court from entertaining the Petition in this private suit against Montana or its state officials in their official capacities because:

1. Petitioners do not claim that Congress authorized this suit under the enforcement clause of the 14<sup>th</sup> amendment, and no such authority exists. Part I.B.
2. "The *Young* fiction," a controversial non-constitutional exception to Eleventh Amendment immunity created by *Ex Parte Young*, 209 U.S. 123 (1908), has been limited by the Court's recent 11<sup>th</sup> Amendment jurisprudence. This exception should not be available in this case for each of the following independent alternative reasons:

a) The *Ex Parte Young* exception is based on the fiction that a suit is brought against an individual and not the state if it names an official of the state in the official's individual capacity. Part I.C.1. This fiction has not been properly invoked here because this suit was expressly commenced against two state offices, and only

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authorize Congress to abrogate States' immunity from private suits, contrary to the constitutional design explained in *Alden*, *Central Virginia* is best understood as being an anomaly confined to its facts. Its holding relating to bankruptcy law does not in any event affect the 14th Amendment issue presented in this case.

arguably prosecuted against their official incumbents in their official capacities, but not against the incumbents in their individual capacities, as required to invoke the *Young* fiction. Part II.

b) The facts of this case do not satisfy the requirements of the *Young* fiction as limited by such cases as *Seminole Tribe* and *Coeur d'Alene Tribe*: this case involves public policy supported by all three branches of the Montana government; it involves special sovereignty interests of Montana in the integrity of its elections; it involves great potential financial burdens on the state from political corruption; and alternative means for enforcing federal law in this case which do not raise 11th Amendment immunity issues are available. [See EI Br.I.B]

The 11th Amendment was the first amendment adopted after the Bill of Rights, and also the first of several required to reverse a decision of this Court. The decision it reversed, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), promptly earned general opprobrium by attempting to extend this Court's jurisdictional powers beyond that widely considered - only a few years after its adoption - to have been granted by the Constitution to the U.S. Supreme Court.

This Court has "acknowledged that the *Chisholm* decision was erroneous. See, e. g., *Alden*, 527 U. S., at 721-722." 535 U.S. 753. Part I.A. The time has come to abandon, as equally erroneous, both the *Young* fiction created in the *Lochner* era to circumvent the 11<sup>th</sup> Amendment, and any "federal question" exception

remnant of pre-*Hans* doctrine based on waiver fiction. [See EI Br.III.A] Both have undermined Eleventh Amendment immunity by self-created extensions of the Court's jurisdiction similar to that involved in *Chisholm*. The *Young* fiction artificially distinguished state officials obviously working for an arm of the state in their official capacity from the states they work for. To support this fiction the Court also invented a distinction between private suits for injunctive or prospective relief and private suits for damages, which directly contradicted the text of the 11<sup>th</sup> Amendment barring "any suit in law or equity." Part I.C.2.

Judge-made exceptions to the 11th Amendment, resting on the infirm foundation of fiction, should not apply to force Montana to defend in federal court this suit by private corporations in the absence of a clear mandate from Congress abrogating Eleventh Amendment immunity by valid exercise of its Fourteenth Amendment, Sec. 5, remedial power. Part I.B.

Rejection of the Petition in this case for lack of jurisdiction would still "allow[] Congress to abrogate the immunity from suit guaranteed by th[e Eleventh] Amendment," 517 U.S. 59, in order to enforce the 14<sup>th</sup> Amendment rights alleged by Petitioners, or alternatively the Executive branch to prosecute a direct suit against the state. Without such support from an elected branch of the United States, [See EI Br.I.B.3], the *Chisholm*/Eleventh Amendment episode of American history teaches that this Court lacks the "judicial power" to hear the claim Petitioners seek to prosecute in this Court against Montana. This Court

otherwise denies Montana the dignity and the rights appertaining to its sovereign role. Part I.A.

## **ARGUMENT**

### **I. THE SUPREME COURT LACKS JURISDICTION OF THIS CASE UNDER ARTICLE III AND THE 10TH AND 11TH AMENDMENTS OF THE UNITED STATES CONSTITUTION**

This Court is foreclosed by Eleventh Amendment immunity from construing its judicial power to include a suit, commenced in state court and prosecuted in this Court by two Montana corporations against arms of the state of Montana, or officials acting in their official capacity, for the purpose of enjoining Montana's enforcement of election finance anti-corruption law.

#### **A. The *Chisholm*/Eleventh Amendment Episode Confirmed Fundamental Jurisdictional Principles of State Immunity from Private Suit in the Supreme Court That Preclude Grant of Certiorari In This Case**

In *Chisholm*, a private creditor brought suit against the State of Georgia in the United States Supreme Court. The governor and attorney general of Georgia, who had been summoned, refused to appear. According to widespread understanding, the newly adopted Constitution did not allow the Supreme Court to entertain a suit by a private citizen against a sovereign state without its consent. Georgia's House of

Representatives passed a resolution declaring that Georgia would regard any judgment in the case as unconstitutional. 527 US 717.

In a decision considered to be the first significant act of the Supreme Court, four justices held that Art III, Sec 2's mention of cases in which a State is a party conferred jurisdiction over private suits against states. Justice Iredell - a former delegate to the Constitutional Convention - in dissent argued that it did not, because Article III is not self-executing. "[I]n respect to the manner of [the Court's] proceeding, we must receive our directions from the Legislature .... It is their duty to legislate so far as is necessary to carry the Constitution into effect. It is ours only to judge." Accordingly "even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies" 2 U.S. 433, 448-49.

This Court has attributed authority to Justice Iredell's dissent. 134 U. S. 12-19. His views that the Constitution did not grant the Court power to entertain the suit against Georgia was swiftly vindicated by Congress. Faced with a case similar to *Chisholm*, the Massachusetts legislature, like Georgia's, had similarly resolved not to appear before the Supreme Court, and instructed its congressional delegation to pursue an amendment restoring the original understanding that no state could be privately sued in federal court. Because the Court seized power under its original, not appellate, jurisdiction, Congress could not, by exercise of its Art. III, Sec. 2, Clause 2 "Exceptions Clause" powers, simply nullify the Court's decision by stripping its appellate jurisdiction over suits against states, as



Justice Iredell's views might suggest. Reversal of *Chisholm* required a constitutional amendment.

Massachusetts recruited four other states to support such an Amendment. "Georgia's response was more intemperate: Its House of Representatives passed a bill providing that anyone attempting to enforce *Chisholm* would be 'guilty of felony and shall suffer death, without benefit of clergy, by being hanged.'" 527 U.S. 717. Two days after the Court's opinion, amendments reversing the decision were proposed in both houses of Congress.

The framers of both the Constitution and the 11th Amendment thought that an imposition of federal coercive power against the states by entertaining private suits against them in federal court could initiate war. The denial of such authority had been fundamental to the Constitutional settlement, albeit absent from the text. Failure to honor that settlement was a potential *casus belli*. Much as the Supreme Court's decision in *Dred Scott v. Sandford*, U.S. (19 How.) 393 (1857) sixty years later did lead to civil war over similar issues of federalism, *Chisholm* in its time was considered equally as dangerous if not corrected by peaceful means. "The adverse reaction to *Chisholm* was immediate, widespread, and vociferous." 440 U.S. 437 n. 4. Congress' quick approval of the proposed 11th Amendment to reverse the majority decision was "close to unanimous." 527 US 721. The requisite 3/4 of the states quickly ratified by February 1795, within a year after submission of the Amendment to them, with virtually no political opposition. W. A. LaBach, *The Supreme Court Fails Its First Test: Chisholm v. Georgia* (2009).



The Art III, Sec. 2 language interpreted by the Court to extend its jurisdiction in *Chisholm* did not include mention of cases between a state and its own citizens. "Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to "address the specific provisions of the Constitution that had raised concern during the ratification debates and formed the basis of the *Chisholm* decision." [527 US] at 723." 535 US 753. "The Amendment did not attempt to bar in-state citizens from suing their own states because no one had suggested that Article III would permit such suits." Clark, *The Eleventh Amendment And The Nature Of The Union*, 123 Harv. L. Rev. 1820 (2010). The Amendment accordingly did not address this aspect of sovereign immunity from private non-diversity cases in order to overturn the specific Court's decision in *Chisholm*. A contemporary decision of this Court observed that "the amendment . . . does not import an alteration of the Constitution, but an authoritative declaration of its true construction." *Respublica v. Cobbet*, 3 U.S. (3 Dall.) 467, 472 (1798). The 11th Amendment did not change, but rather explained or construed, the constitutional design.

This "true construction" of the original constitutional design had been understood to exclude all non-diversity federal question suits against a non-consenting state from federal jurisdiction as a fundamental feature of the constitutional settlement.

Justice Kennedy in *Alden v. Maine*, 527 U.S. 706, 713 (1999) clarifies that the "Eleventh Amendment immunity ... phrase is convenient shorthand but ... the

Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the[ir] sovereignty." *Amicus* follows Justice Kennedy's use of the "Eleventh Amendment immunity" phrase to refer to the amendment's explanation, occasioned by *Chisholm*, of the intention of the "plan of the convention" not to permit "any suit in law or Equity" by any person to be prosecuted against a non-consenting state in the Supreme Court, or other federal court. "Simply put, "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239, n. 2 (1985); accord, *Edelman v. Jordan*, 415 U. S. 651, 660 (1974)." 527 U.S. 706.

The "shock of surprise," *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934), and "outraged reaction to *Chisholm*," 527 U.S. 706, expressed itself in immediate opposition to what was perceived as a power-grab by this Court at the expense of the states. It was so strong that the Amendment did more than only remove the Article III judicial power claimed by this Court. Justice Iredell's dissenting view that "the judicial authority, can only be carried into effect by acts of the Legislature" suggests the Court could acquire jurisdiction by act of Congress. But the Amendment goes beyond this reasoning by confirming that the 1789 Constitution, as amended by the 1791 Bill of Rights, intended that even Congress, under its Article I powers, may not "construe" any part of the Constitution to authorize a law empowering the Supreme Court, or other court, to entertain a private

party's suit against a State without its consent. See *Seminole Tribe*, 517 U.S. 64-68; *Alden*, 527 U.S. 754 ("States ... immunity from private suit ... is beyond the congressional power to abrogate by Article I legislation"); *College Sav.*, 527 U.S. 666, 669-75 (1999) (Scalia, J.); *Board of Trs. of the Univ. of Alabama v. Garrett*, 531 U. S. 356, 363 (2001). But see *Cent. Virginia*, 546 U.S. 356, note 3. The states' immunity from private suit is an undelegated element of their sovereign immunity which is protected against federal intrusion by the Tenth Amendment. Cf *Printz v. United States*, 521 U.S. 898 (1997). [See EI Br. IILB]

As shown below, this absolute constitutional prohibition has only one constitutional exception, which cannot be invoked here.

#### **B. Civil War Amendments Give Congress Exclusive Authority to Abrogate Eleventh Amendment Immunity**

The Civil War changed relations between the United States and the several states from the original constitutional design confirmed by the 11<sup>th</sup> Amendment. This change was embodied in the Civil War Amendments ("CWA") which empowered Congress to enforce against the states abolition of slavery (13<sup>th</sup>), civil rights and liberties (14<sup>th</sup>) and the franchise (15<sup>th</sup>) for freed slaves and others.

This enforcement power was immediately used. "One of the first pieces of legislation passed under Congress 's [14<sup>th</sup> Amendment] § 5 power was the Ku Klux Klan Act" of 1871." *Tennessee v. Lane*, 541 U.S. 509, (2004) (Scalia, J., dissenting). See also *The Civil*

*Rights Cases*, 109 U.S. 3 (1883) (Civil Rights Act of 1875); *Ex parte Yarbrough (The Ku Klux Cases)*, 110 U.S. 651, 658 (1884) (Enforcement Act of 1870).

With the end of Reconstruction, after the presidential election compromise of 1876, see Polakoff, *The Politics of Inertia: The Election of 1876 and the End of Reconstruction* (1973), this Court converted the 14th Amendment to protect railroads, e.g. *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (constitutional corporate personhood fiction), more than former slaves, e.g. *Plessy v. Ferguson*, 163 U. S, 537 (1896) ("separate but equal" Jim Crow enabling act). See A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2009). In *The Civil Rights Cases*, the Court narrowed Congress' authority to remedy racial discrimination under its CWA enforcement powers, which entered a century of congressional neglect.

The 20<sup>th</sup> century "second reconstruction" rediscovered those powers. Cf. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249-50 (1964) (primarily based in commerce clause) with *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (based in Sec. 5 of the 14th Amendment). Meanwhile there was no discussion of the impact of the enforcement clauses on Eleventh Amendment immunity. After their rediscovery, the question of their effect on Eleventh Amendment immunity soon emerged.

In 1964 this Court observed "Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress." *Parden v.*

*Terminal R. Co.*, 377 U. S. 184, 187 (1964). The Court made a rocky start on the issue in *Parden*. *Parden's* rationale for lifting the bar of immunity eroded over the years until it was expressly reversed as wrongly decided in *College Sav.*, 527 U.S. 666 (1999).

Ten years after *Parden*, *Edelman v. Jordan*, 415 U. S. 651, 660 (1974), upheld certain Eleventh Amendment immunity against claims made under the Fourteenth Amendment. The Court found as support for its broadened recognition of state immunity that "in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent," 415 U. S. 672. This ruling foresaged the unanimous landmark decision in *Fitzpatrick v. Bitzer*, 427 U. S. 445, 455 (1976), which expressly approved congressional abrogation of Eleventh Amendment immunity under §5. Observing that its "analysis begins where *Edelman* ended," 427 U. S. 452, the Court held for the first time that the presence of "the threshold fact of congressional authorization," in the case before it abrogated Eleventh Amendment immunity.

For support the *Fitzpatrick* Court looked to the late reconstruction era case, *Ex parte Virginia*, 100 U. S. 339 (1880), and more recent "second reconstruction" cases, while acknowledging,

that none of these previous cases presented the question of the relationship between the 11th Amendment and the enforcement power granted to Congress under Sec 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state



sovereignty which it embodies ... are necessarily limited by the enforcement provisions... Congress may, ... for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

This decision left two questions: first, how to determine when Congress has validly used its enforcement clause powers, as distinguished from Art I powers; second, the degree of clarity required to conclude that Congress has in fact used those powers. "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Board of Trs.*, 531 U. S. 356, 363 (2001) (internal citation and quotes omitted).

The other area of significant development of Eleventh Amendment immunity doctrine during the next several decades was the question of how a state expresses consent to jurisdiction in those cases where Congress has not abrogated immunity. The three issues are discussed briefly below to illustrate the significant development of state immunity doctrine after rediscovery of the CWA Enforcement Clauses.

#### 1. *Abrogation Must Have Valid Relation to Congress' Enforcement Power*

In response to what became Congress' routine use of its abrogation authority, the Court confirmed that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of



Congress' [14th Amendment] enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States,"<sup>100</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997)(citation omitted). This included the state's "sphere[] of autonomy" derived from its 11<sup>th</sup> Amendment immunity from private suit. However the Court distinguished the responsibilities of the "Court, not Congress, to define the substance of constitutional guarantees, 521 U. S., at 519-524, " 531 U.S. 365, as distinct from the power of Congress to enforce those guarantees by defining remedies for their violation.

To distinguish legitimate from illegitimate applications of enforcement clause authority the Court eventually pulled in the reins when it deemed that Congress had strayed beyond the "metes and bounds of the constitutional right in question," 531 U.S. 365, that is, the substantive 14<sup>th</sup> Amendment guarantees as defined by the Court. In *Boerne* the Court found Congress had exceeded its enforcement power. See also *Nevada Dep't. of Human Res. v. Hibbs*, 538 U. S. 721 (2003); *United States v. Morrison*, 529 U. S. 598 (2000) (Violence Against Women Act). Such limitations applied with even more force to the remedy of abrogation of state immunity. See e.g. *Florida. Prepaid Postsecondary Educ. Expense Bd. v. College Sav.*, 527 U.S. 627 (1999) (abrogation of state immunity invalid); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (abrogation invalid); *Board of Trs.*, 531 U.S. 356 (2001) ("a history and pattern" of violations must be shown). *Coleman v. Court Of App. Of Md.*, 132 U. S. 1327 (2012) ("Congress must identify a pattern of constitutional violations and tailor a remedy congruent

and proportional to the documented violations.") *But see Tennessee v. Lane*, 541 U.S. 509 (2004) (abrogation valid).

After a good deal of such litigation refining the boundaries of Congress' abrogation authority, the jurisprudence has become reasonably settled. Justice Scalia could conclude by 2006 that "no one doubts that §5 grants Congress the power to "enforce ... the provisions" of the [Fourteenth] Amendment by creating private remedies against the States for actual violations of those provisions." *United States v. Georgia*, 546 U.S. 151 (2006) (14th Amendment remedy; abrogation upheld). This rule would, for purposes of argument, allow Congress to authorize Petitioners' underlying 14<sup>th</sup> amendment claim against Montana in this case, though it has not done so. Since Congress could arguably have authorized such a remedy, Enforcement Clause abrogation provides the sole means by which the bar to Supreme Court jurisdiction could be lifted in this case.

## 2. *Abrogation must be clearly expressed*

The Court has also specified how Congress may exercise its Enforcement Clause abrogation authority. Enforcement Clause abrogation requires a specific statute addressing the subject of the suit which expresses Congress' intent to abrogate the states' immunity from private suit in clear, unmistakable, and unequivocal terms. Abrogation will not be inferred from a general authorization for suit in federal court. This strict requirement is essential to respect sovereign immunity.

In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-99 (1984) the Court was unwilling to infer that Congress intended to negate the States' immunity given "the vital role of the doctrine of sovereign immunity in our federal system," quoted by *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The Court held that, "The fundamental nature of the interests implicated by the Eleventh Amendment dictates" that Congress express "its intention unmistakably clear in the language of the statute." *Id.* In *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 469 (1987) the Court rejected abrogation because "Congress has not expressed in unmistakable statutory language its intention to allow States to be sued in federal court." Abrogation requires "an unequivocal expression that Congress intended to override Eleventh Amendment immunity," *id.*, citing *Pennhurst* and *Atascadero*. "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 U.S. at 246.

The Court will not look to legislative history in making its inquiry. *Dellmuth v. Muth*, 491 US 223, 227, 230 (1989). Arguments "not based in the text of the statute" are unavailing. *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 103-04 (1989).

Petitioners invoke this court's jurisdiction only under 28 U.S.C. § 1257, Pet. at 1, a general federal question statute which does not mention suits against states, or their immunity, let alone satisfy the strict requirements to abrogate states' immunity from such a suit. Petitioners have not alleged that Congress abrogated Montana's Eleventh Amendment immunity

from private suit regarding its election finance anti-corruption laws by means of a federal statute that could satisfy such standards of specificity. Sec. 1257 is not the specific abrogation of state sovereignty required to confer jurisdiction over this case, and *Hans* specifically rejected federal question jurisdiction as support for any exception to Eleventh Amendment immunity. [See EI Br.III.A.2]

### 3. *Waiver Must Be Clear and Unmistakable and Not Implied Or Construed*

Waiver by a state of its immunity from the Court's subject matter jurisdiction is an anomaly of the Eleventh Amendment immunity doctrine. This waiver doctrine departs from the general rule that no person can confer subject matter jurisdiction on a federal court. The states retained this power, which preserves an option to defend. "[D]eparture from the usual rules of waiver stems from the hybrid nature of the jurisdictional bar erected by the Eleventh Amendment." *Wisconsin Dept. of Corr. v. Schacht*, 524 U.S. 381, 394-95 (1998) (Kennedy, J., concurring) (suggesting an "attorney authorized to represent the State can bind it to the jurisdiction of the federal court for Eleventh Amendment purposes") *Id.* at 400.

This unique power of the states to confer federal subject matter jurisdiction in derogation of its sovereign immunity makes it important that the waiver is executed in a voluntary, deliberate manner. The judicial power cannot be abused to "construe" waiver where it did not actually exist. Nor may Congress construe certain activities as inferring waiver where it

would not otherwise have power to abrogate immunity. For example, mere involvement in litigation may not be construed as a waiver. See note 2.

The Court has developed extensive jurisprudence to define the requirements of a legitimate waiver, in order to avoid illegitimate exercise of federal power. Waiver doctrine is long-standing, e.g. *Clark v. Barnard*, 108 U.S. 436 (1883), but has undergone recent development in readjusting to the developing doctrines discussed in Part I.B(1-2).

**C. The judge-made *Ex Parte Young* Exception to Eleventh Amendment Immunity, dating from the *Lochner*-era, rests on an outdated legal fiction and violates unambiguous Constitutional text**

*1. The legal fiction*

By 1908 state sovereignty was no longer the fighting faith it was prior to the Civil War. The Court was prepared to make another *Chisholm*-like reach for power from the states. It did so to prevent Minnesota from regulating railroad freight tariffs in its state. Bearing in mind the constitutional changes wrought in federal relations by the Civil War four decades earlier, the Court nevertheless held that "a decision of this case does not require an examination or decision of the question whether [the] adoption [of the Fourteenth Amendment] in any way altered or limited the effect of the [Eleventh] Amendment" *Ex Parte Young*, 209 U.S. 123, 150 (1908).



This retreat from the text of the Constitution is perhaps understandable in light of the almost three decades the Court necessarily took since 1974 to actively deliberate issues and elaborate doctrines related to Enforcement Clause abrogation. The 1908 Court could not be expected to resolve the doctrinal issues in its first glimpse at how a 14th Amendment claim may affect Eleventh Amendment immunity. So it took a shortcut. Like *Parden*, this first effort was a wrong turn. But it was a route to be expected of the most activist Court in United States history, reaching "the nadir of competence that we identify with *Lochner v. New York*, 198 U.S. 45 (1905)," *Seminole*, 517 U.S. 44 (Souter, J. dissenting), acting on what Justice Breyer has described as "*Lochner's* pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue." *Sorrell v. IMS Health Inc.*, 131 U. S. 2653 (2011)(dissent).

Congress having not acted to subject Minnesota's ordinary police power regulation of a natural monopoly to the railroads' 14<sup>th</sup> Amendment liberty to be free from regulation, the *Lochner* era Court nevertheless predictably suffered no doubt or hesitation in "substituting judicial for democratic decisionmaking" in order to legislate this result. *Young* created an alternative way to grab power from the states that did not involve Congress' enforcement powers under the Fourteenth Amendment. For this purpose it invented a legal fiction. The fiction in principle repealed the 11th Amendment. A refinement partially concealed the offense by limiting the repealer in a way that violated the text of the Amendment. Part I.C.2



The Court has acknowledged that this exception rests on an "obvious fiction," 521 U. S. 270, to get around the express constitutional prohibition of such suits. A suit such as this suit against Montana, brought under "[t]he provisions of the Fourteenth Amendment of the Constitution," must "have reference to state action exclusively, and not to any action of private individuals." *Virginia v. Rives*, 100 U.S. 313, 318 (1880). In order to avoid the 11th Amendment's bar to suing a state, however, a party must inconsistently and counter-factually sue a state official as a private individual. This gives rise to *Young's* fictional avoidance of the 11<sup>th</sup> Amendment by means of suit nominally, but not actually, against an individual official.

Under well-accepted principles, suit against an office or officer where the state is the real party in interest, is barred by 11<sup>th</sup> Amendment immunity. For example, Chief Justice Marshall in *Governor of Ga. v. Madrazo*, 1 Pet. 110, 123-124 (1828) found the "claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially." *Madrazo* held this equivalent to suing the State itself in violation of the 11th Amendment, which provided an alternative ground for dismissing the suit. The Court similarly held in *Ex Parte Ayers*, 123 U.S. 443, 489 (1887) "where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question ... is one of jurisdiction."

Where, as here, all three branches of its government were closely involved in making, enforcing and adjudicating Montana's challenged legislation, "The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment." *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 169 (1909) (11<sup>th</sup> Amendment bars "bill in equity to compel the specific performance of a contract"). It bears noting that in *Murray*, decided the following year after *Young*, which lifted the bar in a 14<sup>th</sup> Amendment suit, the Court declined to lift the bar of immunity for a private suit in equity brought against individual officials acting in their official capacity in a case that did not implicate the 14<sup>th</sup> Amendment.

In *Pennhurst* the Court explained: "The general rule is that a suit is against the sovereign if the judgment sought ... to interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963)." 465 U. S. 89, 101 n.11. See also 527 U.S. 706.

*Ex Parte Young*, 209 U.S. 123 (1908) held that a federal court nevertheless does have jurisdiction, consistent with the 11th Amendment, to hear a private suit against a state officer named as an individual in order to enjoin official state actions violating federal law, even though the state itself may be immune had the suit been brought in the name of a state office or officer to accomplish the identical result. Since the state cannot act but through individuals, that of course

is the opposite of immunity. And that is how legal fictions work, to turn rules upside down.

The state and its various "arms," its agencies, offices, departments, commissions and bureaus, can only act through officials. A state is a human institution representing the people who create it with no existence or ability to act apart from those people who comprise it. So if an official does not benefit from immunity when acting in an official capacity, then the state itself is not immune. Hence, "*Young* rests on a fictional distinction between the official and the State." 521 U. S. 270 n. 25, citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U. S. 89, 114, n. 25 (1984). The fiction rested on a pretense that if the officer was named as an individual acting in an individual capacity the suit was actually against the individual, when it was obviously not.

This Court has explained the "stripping" justification for this fiction.

The injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character," *Young*, 209 U.S. 160. This "stripping" rationale, of course, created the "well-recognized irony" that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982)

(opinion of Stevens, J.)" 465 U.S. at 104-05, 114 n.25.

In addition to this "irony," which creates inconsistent and hyper-technical pleading requirements, see Part II, suits brought to prohibit officials from carrying out policies supported by all three branches of the state government without any element of individual discretion or motivation, as here, are clearly suits against the state itself in the constitutional sense and it is fictional to hold otherwise. The "expedient 'fiction'" created in *Ex Parte Young*, in effect amended the Constitution without a 2/3 approval of Congress or ratification by 3/4 of the states.

By disabling the officials who carry out state policies, "the *Young* fiction," 521 U.S. 281, eroded the protection the states had enjoyed from "private suits ... not permitted under Article III (by virtue of the understanding represented by the Eleventh Amendment)," *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 at 40 (1989) (Scalia, J., concurring in part and dissenting in part). The *Young* fiction revived the Court's discredited decision in *Chisholm* by ignoring, at the Court's discretion, the 11th Amendment's bar of private suit against the state. *Young* failed to distinguish between an official acting within the general scope of authority given by the state, who a state has merely allowed to inflict a justiciable injury in violation of federal law as "mavericks under state law," 521 U.S. 310 (Souter, J. dissenting), and an official who is carrying out the fully-supported policies of the state. The "stripping" metaphor might apply to the former, but not to the latter without altering the Constitution.

Whether it is true as Jeremy Bentham said that "fictions are to law what fraud is to trade," they are a common law device that do not sit easily in constitutional law. A legal fiction applied to the Constitution, by judicially amending the Constitution, circumvents the approval by Congress and the elected sovereign state legislatures that Article V of the Constitution requires. This is what *Young* did in an era that marked the high-point of judicial amendments to the Constitution.

When a fiction is created for the very purpose of amending the constitutional text so as to diminish the sovereign powers of the states in order to enlarge the jurisdiction of the Supreme Court which invented the fiction, and thus deny the states their right to approve or reject such an amendment, the validity of the fiction is highly suspect. Normally, "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." *Am. Fire & Cas. Co. v. Finn*, 341 U. S. 6, 17 (1951). This is especially true when the expansion is at the expense of the constitutionally protected power of the states. Cf. *Printz v. United States*, 521 U.S. 898 (1997) (Scalia, J.) ("the Tenth Amendment ... prohibits the exercise of powers "not delegated to the United States."). A constitutional fiction is particularly difficult because it requires a constitutional amendment to undo, unless the Court itself will scrap it when it no longer serves a justifiable purpose.

A more helpful metaphor in understanding why the time has now arrived to complete the dismantling of this particular instance of a constitutional legal fiction is provided by Professor Fuller. He observed that legal



fictions are like scaffolding around a building under construction. Fuller, *Legal Fictions*, 25 Ill. L. Rev. 363, 513, 877 (1930-31). The scaffolding is not itself a building and has no permanent value, but it serves a temporary function as construction proceeds. The basic architecture of the jurisprudence supportive of Enforcement Clause abrogation has been completed in its essential parts for only a decade. In 1908, when the *Young* fiction scaffolding went up, the foundation stone had barely been laid for this doctrinal edifice. Now, after the building of Enforcement Clause abrogation is complete, the Court should not hesitate to bring down the unsafe scaffolding represented by the *Young* fiction. *Young* was judicial legislation typical of the *Lochner* era, and is now unnecessary.

The abrogation edifice is complete. Congress' fully evolved textually-based Enforcement clause abrogation is an accepted feature of American law, with extensive doctrinal development. Aside from one small annex to the building, see *Cent. Virginia*, note 3, there has been no major construction for about a decade. See *Fed. Mar Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (Thomas, J.). It is now time to complete removal of the scaffolding erected by the *Young* fiction. At this point, it presents little more than a hazard that can easily trip up potential users of the building. See discussion of *Virginia Office*. [See EI Br.II] As discussed below, the Court is well along in the process, has dismantled and reformulated the doctrine, and perhaps even abandoned its prior textually unsupported applications. [See EI Br. I.B-II]



## 2. *The unambiguous Constitutional text*

In *Young* the Court enjoined enforcement of a Minnesota statute that fixed maximum rates in a suit under the Fourteenth Amendment by a railroad's shareholders. *Young* asserted that equitable remedies against states, but not civil damages, were available from the federal courts for private claimants. This precedent was elaborated and refined over the years. Then *Edelman v. Jordan*, 415 U.S. 651 (1974) started to dismantle *Young* at the same time that it initiated the earliest intimation of Enforcement Clause immunity abrogation. Part I.B.

With *Edelman* both the Enforcement Clause immunity abrogation edifice, built on a solid textually-supported constitutional footing, started rising, at the same time that the doctrine *Young* created wholly in violation and disrespect of the Constitution started to deteriorate. *Edelman* allowed prospective relief under *Young*, but cut back previous authority that had allowed other types of equitable relief that entailed a burden on the state treasury similar to a civil damages action.

This law-equity distinction, reinforced by *Edelman*, had been maintained since *Young* to give the appearance that the 11th Amendment still had some scope of operation in law, while in practice commandeering state officials to obey federal decrees in equity. Like the problem with *Young*, the problem with the decision in *Edelman* was that it violates the text of the 11th Amendment which prohibits "any [private] suit in law or Equity, commenced or prosecuted" against a state. As stated in *Cory v. White*,

457 U.S. 85, 91 (1982) "It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought.... the Eleventh Amendment, by its terms, clearly applies to a suit seeking an injunction, a remedy available only from equity." 457 U. S. 90-91.

The language of the 11th Amendment simply does not allow it to be enforced only against suits at law for damages but not against an action in equity to enjoin officials. Though there is no principled basis for such a rule, this flagrant violation of constitutional text was required to support the central *Young* fiction that a state's officials are somehow separate from the state when the remedy sought by a private plaintiff is prospective.

If the 11<sup>th</sup> Amendment had been swallowed whole by the *Young* fiction, the offense to the Constitution would have been too chokingly obvious. Ignoring some but not all the terms of the text sustained the view that it had not been completely repealed. Justice Douglas, impatient of the limitations of this ruse, objected that *Edelman* was a constitutional case seeking equitable remedies within the ambit of the *Young* fiction: "If that 'judicial power' ... may not be exercised even in 'any suit in . . . equity' then *Ex parte Young* should be overruled. But there is none eager to take the step.... There is nothing in the Eleventh Amendment to suggest a difference between suits at law and suits in equity, for it treats the two without distinction." 415 U. S. 685 (dissent).

Justice Douglas is entirely correct on this point, although he makes it to argue for dropping the pretense

in order to expand the fiction to swallow even more of the 11th Amendment. But the Court did eventually "take the step" in one of its last major cases on the subject. It held that "sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief." *Fed. Mar.*, 535 US at 765-66 (2002) (Thomas, J.). This ruling did not expressly overrule *Young*. But to the extent that *Young* relies on the false premise that the Constitution allows suit where the remedy is prospective, *Federal Maritime* left that fiction without support. Since *Young* stands on two legs – one a fiction and the other the pretense of the law/equity distinction, without the support of the latter *Young* cannot stand. No "rote" application of *Young* may now be made to a case merely because a non-sovereign plaintiff seeks prospective relief. Cutting *Young* loose from the pretense that prospective relief is not barred by the literal text of the Amendment, forces the doctrine to find a new justification, or die. That support would be based on a suits' lack of actual impact on the state's special sovereign interests. See [See EI Br.I.B.2]

Montana's enforcement of its election finance anti-corruption law, because it is fundamental to Montana's sovereign legitimacy, cannot be enjoined by the U.S. Supreme Court in a non-consensual suit by a private petitioner which is not authorized by congressional enforcement of the 14<sup>th</sup> Amendment.

**II. THE YOUNG FICTION DOES NOT  
APPLY IN THIS CASE BECAUSE  
PETITIONERS SUED ARMS OF THE  
STATE AND OFFICERS IN THEIR  
OFFICIAL CAPACITY IN VIOLATION OF  
THE ELEVENTH AMENDMENT**

The fiction and "irony" of the Young exception discussed above, Part I.C.1, entails very technical, counter-factual, and inconsistent pleading requirements.

The rule has long endured that an unauthorized, private suit directly against a non-consenting state, its offices or "arms" is prohibited. "States and arms of the State possess immunity from suits authorized by federal law." *Northern Ins. Co. v. Chatham Cnty*, 547 U.S. 189 (2006). For example, Chief Justice Marshall held in *Madrazo*, where an official is "sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record." 26 U.S. 123-24.

In *Smith v. Reeves*, 178 U.S.436, 438-39 (1900) the Court addressed the question whether a suit against state officials should "be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the State, as such, is not made a party defendant, the suit is against one of its officers as *Treasurer*; the relief sought is a judgment against that officer in his official capacity."

*Great N. Life Ins. Co. v. Read*, 322 U. S. 47 (1944), presented a 14th amendment claim. The Court held, "The right of petitioner to maintain this suit in a federal court depends, first, upon whether the action is against an individual or against the State .... Secondly, if the action is determined to be against the state, the question arises as to whether or not the state has consented to suit against itself in the federal court. ... In the *Reeves* case, as here, the suit was against the official, not the individual. ... We are of the view that the present proceeding ... is like *Smith v. Reeves*, a suit against the state." See also *Ford Motor Co. v. Dep't of Treas. of Indiana*, 323 U.S. 459, 464 (1945). ("[A] suit against state officials that is in fact a suit against a state is barred.")

*Young* did not affect this rule. It only excepted suits against states, in fact, under the guise of suing individuals by name, and not in their official capacity. This guise must be carefully invoked by a private party who would use the *Young* fiction to sue a state. Crossing this clear line justifies dismissal. In *Coeur d'Alene Tribe* this Court confirmed the rule that "suit ... is barred by a state's Eleventh Amendment immunity unless it falls within the exception this Court has recognized for certain suits ... against state officers in their individual capacities." See *Ex parte Young*, 209 U.S. 123 (1908). " 521 U. S. 261, 269 (emphasis added).

The Petitioners bring before the U.S. Supreme Court a suit styled *Western Tradition P'ship v. Attorney General*, 363 MT 220 (2011), stayed pending writ of certiorari sub nom. *Am. Tradition P'ship, Inc. v. Bullock*, 565 U.S. \_\_\_, 132 S.Ct. 1307 (February 17, 2012) which, according to the Petition, was commenced



against two offices which are arms of the State of Montana. They name as appellees 1) the "Attorney General of the State of Montana" and 2) the "Commissioner of the Commission for Political Practices." Pet. ii. Petitioners only mention the individual names of the current incumbents of those offices parenthetically. The appearance of suing the state by naming an arm of the state as a party, rather than the individual office holder, is confirmed by the statement of the case where Petitioner recites that "Montana officials ... are sued in *their official capacities*," Pet. 4, rather than officeholders in their *individual capacities* as required to sustain the *Young* fiction.

According to *Cohens v. Virginia*, 19 U.S. 264 (1821), it is "a rule which admits of no exception that, in all cases where jurisdiction depends on the party, it is the party named in the record." The party named in the record in this case is not an individual sued in an "individual capacity."

Petitioners did not change the caption of this case to omit the named plaintiff-appellant below who is not before this Court. But it did make a belated attempt to change the record by naming in its caption of the case in this Court as party defendant, "Steve Bullock", an individual officeholder distinct from the offices which were defendants named in the complaint below. This unauthorized change, seeking to change the party of record without benefit of a Rule 15 FRCP motion, is evidence that petitioners recognize their pleading error. This change of party in Petitioners' erroneous caption does not change the record of petitioners' claim against offices which are arms of the



state and the occupants of those offices in their official capacities as stated in the body of the Petition.

This is a case where the suit seeks to prevent conduct that does raise core sovereign interests of the state and so is “in fact, against the State.” 527 U.S. 706;[See *El Br.I.B.*]. This suit has been brought to prevent enforcement of a law supported by the full sovereign authority of Montana. “The object and purpose of the Eleventh Amendment [is] to prevent the indignity of subjecting a state to the coercive process of [federal] judicial tribunals at the instance of private parties” *Ex parte Ayers*, 123 U.S. 443, (1887). *Young*’s “stripping” doctrine exception was not adopted by means of formal amendment to the Constitution ratified by the States, though it significantly erodes the states’ constitutional immunity from suit, and hence the states’ dignity as sovereign states. Accordingly, “The authority-stripping theory of *Young* is a fiction that has been narrowly construed.” 465 U.S. at 114 n.25.

A threshold requirement for invoking the *Young* fiction is simple compliance with the pleading rule that the suit be brought under “the exception this Court has recognized for certain suits ... against state officers in their *individual capacities*.” 521 U. S. 269.

Such a fictional exception must be strictly complied with in its particulars by a party who would invoke the exception in this Court. “[A] waiver of sovereign immunity “will be strictly construed, in terms of its scope, in favor of the sovereign.”<sup>100</sup> *Sossamon v. Texas*, 131 U. S. 1651, 1654 (2011)(citation omitted). *Cf. Irwin v. Dep’t Of Veterans Affairs*, 498 U.S. 89 (1990) (affirming judgment of lower court;

"[s]ince waivers of sovereign immunity are traditionally construed narrowly, the court determined that strict compliance ... is a necessary predicate"). Petitioner has failed to comply with the narrow threshold requirements of the *Young* fiction that the pleading "strip" Respondent officeholder of their official character. There are no shades of gray or equitable considerations between "official capacity" and "individual capacity" or between suing an individual or suing the official or office.

In *Hutto v. Finney*, 437 U.S. 678 (1978), a 14th Amendment action where immunity was abrogated by Congress, the Court held that "the Eleventh Amendment prevented respondents from suing the State by name." Here Petitioners have violated that rule by suing two arms of the State of Montana by name. As discussed above, suing an arm of the state is the same as suing the state. The Petition must be dismissed because the suit was actually commenced against a state, which is barred by the 11<sup>th</sup> Amendment.

If it is deemed an extremely technical objection that Petitioners were required to sue appellees in their individual capacities to comply with the *Young* fiction for circumventing the 11th Amendment, the blame should reside on the "irony" or fractured logic of the fiction itself. It requires "a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism." 411 U.S. 279 (justifying an 11th Amendment rejection from federal court).

**CONCLUSION**

Writ of certiorari must be denied for lack of jurisdiction.

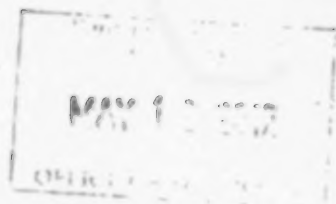
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## APPENDIX:

11<sup>th</sup> Amendment :

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

**AMICUS  
CURIAE  
BRIEF**



No. 11-1179

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IN THE  
**Supreme Court of the United States**

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AMERICAN TRADITION PARTNERSHIP, INC., F.K.A.  
WESTERN TRADITION PARTNERSHIP, INC., ET AL.,  
PETITIONERS

v.

STEVE BULLOCK, ATTORNEY GENERAL  
OF MONTANA ET AL.

---

*PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF MONTANA*

---

**REPLACEMENT BRIEF OF ESSENTIAL  
INFORMATION AS *AMICUS CURIAE* IN  
OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI**

---

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iv
INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	4
<b>I. ELEVENTH AMENDMENT IMMUNITY HAS UNDERGONE DOCTRINAL CHANGE THAT PRECLUDES THE <i>YOUNG</i> FICTION FROM APPLYING TO THIS SUIT</b> .....	<b>4</b>
A. Eleventh Amendment immunity as charted in <i>Alden</i> and <i>Federal Maritime</i> allows no textually unsupported exception .....	4
1. That <i>Alden</i> presented a statutory class claim, whereas Petitioners invoke the Fourteenth Amendment makes no relevant difference .....	5
2. That <i>Alden</i> involved an action for damages, whereas Petitioners seek a declaratory judgment makes no relevant difference .....	7
B. Erosion of the “rote application” of <i>Young</i> makes it inapplicable to this case .....	7
1. The financial burden on Montana in this suit is potentially great .....	11
2. Special sovereignty interests of Montana are at stake in this suit .....	13

3. <i>Alternative constitutional remedies make an unconstitutional remedy unnecessary in this case</i> .....	16
--	----

II. THE "ROTE APPLICATION" OF YOUNG LACKS DOCTRINAL SUPPORT .....	18
---	----

III. THE SUPREME COURT'S APPELLATE JURISDICTION IS AS FULLY BOUND BY "ELEVENTH AMENDMENT IMMUNITY" AS IS ITS ORIGINAL JURISDICTION .....	25
--	----

A. Eleventh Amendment immunity precludes any exception for an appeal from Montana's Supreme Court .....	25
---	----

1. <i>No textual basis exists for distinguishing this Court's lack of original from its lack of appellate jurisdiction over private suits against a state</i> .....	25
---	----

2. <i>Federal question jurisdiction provides no basis for judicial abrogation of immunity</i> .....	26
---	----

3. <i>A State's use of state courts does not waive its immunity</i> .....	27
---	----

4. <i>This is not a case where a state has tactically forced a taxpayer to initiate a suit in order to contest asserted tax liability</i> .....	29
---	----

B. The Tenth Amendment bars judicial insertion in the Constitution of any exception allowing the U.S. Supreme Court to hear private suits against a state .....	30
---	----

IV. NO VALID POLICY JUSTIFICATION EXISTS FOR PERPETUATING EXCEPTIONS THAT VIOLATE THE CONSTITUTION .....	34
--	----

A. Interest in uniformity or convenience does not outweigh the Constitution .....	34
B. The Supremacy Clause did not prospectively nullify the 11th Amendment.....	36
CONCLUSION .....	37
APPENDIX:	
11 <sup>TH</sup> AMENDMENT .....	39

## TABLE OF AUTHORITIES

Page

## CASES

<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	<i>passim</i>
<i>Baker v. Carr</i> , 369 U.S. 186 (1962) .....	32
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	12
<i>Burroughs v. United States</i> , 290 U.S. 534 (1934).....	11, 14, 15
<i>Chisholm v. Georgia</i> , 2 U.S. (2 Dall.) 419 (1793).....	5
<i>Citizens United v. Federal Election Commission</i> , 558 U.S. ____ (2010).....	4, 17, 33, 34
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat.) 264 (1821) .....	<i>passim</i>
<i>College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.</i> , 527 U.S. 666 (1999).....	19, 28
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974) .....	7
<i>Ex Parte Yarbrough (The Ku Klux Cases)</i> , 110 U.S. 651 (1884).....	15
<i>Ex Parte Young</i> , 209 U.S. 123 (1908).....	<i>passim</i>
<i>Federal Maritime Comm'n v. South Carolina State Ports Auth.</i> , 535 U.S. 743 (2002).....	<i>passim</i>
<i>First National Bank v. Bellotti</i> , 435 U.S. 765 (1978).....	33
<i>Graves v. New York</i> , 306 US 466 (1939).....	33
<i>Great Northern Life Ins. Co. v. Read</i> , 322 U.S. 47 (1944).....	31
<i>Green v. Mansour</i> , 474 U.S. 64 (1985).....	7, 36
<i>Gregory v. Ashcroft</i> , 501 U.S. 452, 457 (1991).....	29
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890).....	4, 26, 27
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. ____ (2010).....	11
<i>Idaho v. Coeur d'Alene Tribe of Idaho</i> , 521 U.S. 261 (1997).....	<i>passim</i>
<i>Idaho v. United States</i> , 533 U.S. 262 (2001) .....	17
<i>Los Angeles Police Dept. v. United Reporting Publishing Corp.</i> , 528 U.S. 32 (1999).....	18
<i>Luther v. Borden</i> , 48 U.S. 1 (1849).....	32
<i>Marbury v. Madison</i> , 5 U.S.(1 Cranch) 137 (1803).....	33
<i>Martin v. Hunter's Lessee</i> , 14 U.S. (1 Wheat) 304 (1816).....	26

<i>McKesson Corp. v. Florida Alcohol &amp; Tobacco Div.</i> , 496 U.S. 18 (1990) .....	28, 29
<i>Nevada v. Hall</i> , 440 U. S. 410 (1979) .....	30
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970) .....	6, 14, 31
<i>Parden v. Terminal R. Co.</i> , 377 U. S. 184 (1964) .....	28
<i>Pennsylvania v. Union Gas Co.</i> , 491 U. S. 1 (1989) .....	4, 26, 27
<i>Pittsburgh Press Co. v. Comm'n on Human Relations</i> , 413 U.S. 376 (1973) .....	35
<i>Printz v. United States</i> , 521 U.S. 898 (1997) .....	29, 87
<i>Seminole Tribe v. Florida</i> , 517 U.S. 44 (1996) .....	passim
<i>Sossamon v. Texas</i> , 563 U.S. ____ (2011) .....	11, 28
<i>United States v. Richardson</i> , 418 U.S. 166 (1974) .....	33
<i>Verizon Maryland, Inc. v. Public Serv. Comm'n of Md.</i> , 535 U.S. 635 (2002) .....	8, 9, 10, 12
<i>Virginia Office for Prot. &amp; Advocacy v. Stewart</i> , 563 U.S. ____ (2011) .....	passim
<i>Wisconsin Dept. of Corr. v. Schacht</i> , 524 U.S. 381 (1998) .....	23

#### OTHER AUTHORITIES

Dodson, <i>The Metes and Bounds of State Sovereign Immunity</i> , 29 Hastings Const. Law Q. 721 (2002) .....	32
Fletcher, <i>A Historical Interpretation of the Eleventh Amendment</i> , 35 Stan. L. Rev. 1033 (1983) .....	19
Fruehwald, <i>The Supreme Court's Confusing State Sovereign Immunity Jurisprudence</i> , 56 Drake L. Rev. 253 (2007-08) .....	19
Gibbons, <i>The Eleventh Amendment and State Sovereign Immunity</i> , 83 Colum. L. Rev. 1889 (1983) .....	19
Nguyen, <i>Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction</i> , 93 Cal. L. Rev. 587 (2006) .....	19
Vazquez, <i>Treaty-Based Rights and Remedies of Individuals</i> , 92 Colum. L. Rev. 1082 (1992) .....	6

## INTEREST OF *AMICUS CURIAE*

With the parties' consent, Essential Information files this brief in opposition to writ of certiorari.\*

Essential Information is a non-profit, tax-exempt organization involved in projects encouraging active citizenship, including by providing information on topics important to the public, the media and policy makers. Corporate purchase of elections short circuits the connection between citizens and their government, reducing the value of information in policy making. *Amicus* is interested in this case as an opportunity to both provide essential information on an important public policy and to make information itself more meaningful in policy-making.

## SUMMARY OF THE ARGUMENT

Eleventh Amendment immunity bars the Supreme Court from hearing a private suit against a state without its consent. Montana has not given its consent, and Congress has not authorized this suit by 14<sup>th</sup> Amendment abrogation of Eleventh Amendment immunity.<sup>1</sup> Petitioners have only two other potential arguments to support jurisdiction for their Petition.

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\* The parties were notified ten days prior to the due date of this brief of the intention to file and have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amicus curiae*, its members, or its counsel made such a monetary contribution.

1 The Amicus Brief of The Eleventh Amendment Movement (TEAM) ("TEAM Br.") has provided historical background on the



1. An historical exception to 11<sup>th</sup> Amendment immunity, “the *Young* fiction,” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U. S. 261, 270 (1997) (Kennedy, J.) finds no textual support in the Constitution. See *Ex Parte Young*, 209 U.S. 123 (1908). There is no valid basis for distinguishing this private suit against Montana from the Court’s recent decisions applying Eleventh Amendment immunity. Part I.A. As interpreted in *Coeur d’Alene Tribe, Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and other cases the “rote application” of the *Young* fiction would not apply to this case. Congress has implied it should not. Because the integrity of a state’s elections affect Montana’s core sovereign legitimacy, careful consideration of interests at stake in this suit precludes *Young* jurisdiction over its officials when this suit is actually against Montana. Part I.B

If the *Young* exception applies in this case, it should be redefined to conform to the text of the Constitution and the Court’s more recent doctrinal developments that have brought state immunity from private suit into line with the constitutional text and design. The “rote application” of the fiction that a suit is not against the state itself, although against the highest official of an arm of the state, when acting in a purely official capacity to carry out state law, and the suit impacts state law and policy, should be, if it has not already been, abandoned as the unnecessary, textually unsupported, historical artifact that it has become. Part II.

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development of Eleventh Amendment immunity that is incorporated by reference to avoid duplication. See TEAM Br. I.B; pp. 1-2 notes 1&2.

2. A second court-made exception for "federal question" appeals from state courts, relying on a distinction between suits entertained under the Supreme Court's original jurisdiction and its appellate jurisdiction over appeals from state courts, also finds no textual basis in the Constitution. This remnant of "federal question" abrogation of immunity is inconsistent with over a century of precedent, and rests on fictional consent, while it directly violates the text of the 11<sup>th</sup> Amendment and lacks persuasive precedent in point. Part III.A.

The Tenth Amendment guards against insertion of unstated exceptions in constitutional text in order to expand the jurisdiction of this Court at the expense of the sovereign states, without support from either elected branch of the United States. Part III.B. The Supreme Court is equally bound as are other federal courts, Congress or the executive branch, to comply with the fundamental principles of Eleventh Amendment immunity without creating, on the basis of discarded policies, see Part IV, exceptions for itself in derogation of the Constitution.

## ARGUMENT

**I. ELEVENTH AMENDMENT IMMUNITY HAS UNDERGONE DOCTRINAL CHANGE THAT PRECLUDES THE *YOUNG* FICTION FROM APPLYING TO THIS SUIT****A. Eleventh Amendment immunity as charted in *Alden* and *Federal Maritime* allows no textually unsupported exception**

*Alden v. Maine*, 527 U.S. 706 (1999) and *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002) provided recent opportunity to explore the wider contours of Eleventh Amendment immunity in light of the "fundamental structural importance" of *Hans v. Louisiana*, 134 U.S. 1 (1890). *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 44 (1989) (Scalia, J., concurring in part and dissenting in part). These cases teach that the original immunity doctrine, prior to the Civil War Amendments,

- recognized that the 11th Amendment exemplifies a broader rule of immunity from suit, beyond the text itself, that inheres in the "constitutional design;"
- precluded any federal question basis for jurisdiction over private claims against a non-consenting state; and
- foreclosed any source of jurisdiction for private breach of state immunity whether contained elsewhere in the Constitution or statute.

*Alden* held that Congress, under Article I, could not commandeer a state court to enforce federal law by authorizing private state court suits against the state. *Federal Maritime* held that an independent federal agency could not entertain a private party's proceeding against a state in an Article II adjudication even though it involved prospective relief. Both cases found that the alternative of a direct suit by the United States against the state, and other available means, sufficed for enforcing federal supremacy interests. Part I.B.3

If certiorari were granted here, it would be the Supreme Court under Article III, not Congress, or the executive branch, that would unconstitutionally allow "a private party to haul a State in front of" a tribunal, 535 US 760 n.11. This Court has identified no textual basis for distinguishing itself from the Article I (*Alden*) and Article II (*Federal Maritime*) contexts in which it has found Eleventh Amendment immunity to absolutely preclude such jurisdiction over non-consenting states. No factors present here distinguish this case against Montana from *Alden* and *Federal Maritime*.

1. *That Alden presented a statutory claim, whereas Petitioners invoke the Fourteenth Amendment makes no relevant difference*

The Eleventh Amendment clarified that this Court lacks any authority under Article III to hear any private suit against a non-consenting state. When the Supreme Court laid claim to such power in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) it was emphatically denied. TEAM Br.I.A

Congress acquired authority under the Fourteenth Amendment to provide remedies for its violation, including the remedy of abrogating Eleventh Amendment immunity. The Supreme Court supervises this abrogation authority. TEAM Br I.B.1&2. It does not exercise that authority. "It is not said the *judicial power* of the general government shall extend to enforcing ... rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. *It is the power of Congress which has been enlarged.*" *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (citation omitted).

Plaintiffs in *Alden*, as in *Seminole Tribe*, invoked an abrogation statute, but their claim was grounded in Article I, not the 14<sup>th</sup> Amendment. Here petitioners recite a claim under the 14<sup>th</sup> Amendment, but do not, and cannot, cite to a statute abrogating state immunity. Since both 14<sup>th</sup> Amendment and statutory abrogation legs are necessary for Petitioners' suit against the state to stand, it makes no difference which of the two prerequisites to suit against Montana is missing here.

The only other relevant text of the Constitution from which such a distinction between statute and Constitution could potentially be drawn is the Supremacy Clause. But the Supremacy Clause provides no basis for elevating constitutionally-based claims as any more enforceable than "laws" or "treaties." "[T]he Framers adopted the very same mechanism for enforcing treaties, federal statutes, and the Constitution itself." Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L Rev 1082, 1108 (1992). And "neither the Supremacy Clause nor

the enumerated powers of Congress confer authority to abrogate the States' immunity from suit in federal court." 527 U.S. 732-33. Part IV.B.

2. *That Alden involved an action for damages, whereas Petitioners seek a declaratory judgment makes no relevant difference*

Petitioners would argue that their declaratory judgment action seeks equitable prospective relief, bringing this suit within "the *Young* fiction." There is no textual basis for drawing a distinction between suits in law or equity for enforcing Eleventh Amendment immunity. The text expressly bars "any suit in law or equity." A declaratory judgment, though an action in law, shares features of both.

This Court has held, "[t]he propriety of issuing a declaratory judgment may depend upon equitable considerations." *Green v. Mansour*, 474 U.S. 64, 72 (1985). But as held in *Federal Maritime*, 535 U.S. 765, "sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief," such as the declaratory judgment sought in the present case. *Federal Maritime* thus hobbled one of the legs on which *Young* stands.

#### **B. Erosion of the "rote application" of *Young* makes it inapplicable to this case**

*Edelman v. Jordan*, 415 U.S. 651 (1974) began the retreat from *Young* where "payment of funds from the state treasury" was threatened. Going beyond *Edelman*, the Court more recently denied equitable relief on other grounds. While the Court has declined

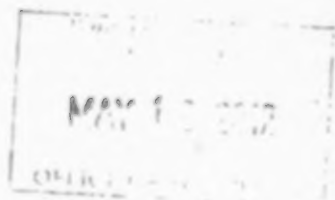


to overrule *Young* by word, see e.g. *Seminole Tribe*, 517 U.S. 71, n.14, *Coeur d'Alene Tribe*, 521 U. S. 269, dissents allege that it is doing so in deed.

*Young* is still applied when a case “parallels the very suit permitted by *Ex parte Young* itself,” in the area of state utility regulation, *Verizon Maryland, Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 649 (2002) (Kennedy, J. concurring). But the doctrine has been eroding in two major areas which preclude its application to this case against Montana.

One line of authority asks whether Congress has chosen to deny *Young* jurisdiction. *Seminole Tribe*, 517 U.S. 75-76 & n.17, found Congress’ statutory remedies implied rejection of *Young*. Justice Souter dissenting in *Seminole Tribe*, 517 U.S. 102, observed: “To reach the Court’s result, it must ... displace the doctrine of *Ex parte Young*.” Justice Souter read Congress’ intention as allowing a *Young* injunction. Thus both majority and minority accepted that Congress determines when *Young* applies.

*Verizon Maryland* involved a hybrid regulatory adjudication under federal law by a state agency subject to federal appeal. The Court considered whether acts of Congress “display any intent to foreclose jurisdiction under *Ex parte Young*” or “implicitly exclud[e] *Ex parte Young* actions.” 535 U.S. 635, 647. “Only after determining that Congress had not done so did the [*Verizon Maryland*] Court conclude that the suit could go forward under *Ex parte Young*.” *Virginia Office*, 563 U.S. \_\_\_, \_\_\_, n.3 (Roberts, C.J. dissenting).



No. 11-1179

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Cases seeking to enjoin individual office holders acting under color of, but not under the clear commands of, state law may not actually be directed against the state's core sovereign interests. But this suit to block a law enacted by Montana's people and legislature, supported by its governor, enforced by its agency, defended by its attorney general, upheld by its Supreme Court, and protective of Montana's republican legitimacy is, "in fact, against the State" of Montana. It is not against officials acting in their individual capacity on matters peripheral to sovereign interests. In the words of Justice O'Connor, writing separately in *Coeur d'Alene Tribe* for herself, Justices Scalia and Thomas, "it simply cannot be said that the suit is not a suit against the State," 521 U.S. 296, where, as here, named state offices and officials are charged with no more than an intention to properly carry out their duty to enforce a state law actively supported by all branches of Montana's government.

Justice Souter, dissenting, accurately observed that "[*Coeur d'Alene Tribe*] pierces *Young's* distinction between State and officer" and "would redefine the doctrine ... to a principle of equitable discretion ... at odds with *Young*.." 521 U.S. 297, 306. Justice Souter thus describes the redefinition of *Young* that at least four justices of this Court have pursued. Without this change of direction, as Justice Kennedy has put it, "the Eleventh Amendment, and not *Ex parte Young*, would become the legal fiction." 535 U.S. 649.

Justice Kennedy posits the "commonsense observation" that "[w]hen suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing

interest in the litigation whenever state policies or procedures are at stake.” 521 U.S. 269. Careful analysis is required to determine when those state interests are sufficient to “pierce[] *Young*’s distinction between State and officer.” Justice Kennedy suggests several tests counseling rejection of “reflexive” *Young* remedies.

Tests for determining application of *Young* to the present case should be liberally construed in favor of Montana. “*Young* is a fiction that has been narrowly construed,” 465 U.S. at 114 n.25, and like any derogation of sovereign immunity is “strictly construed ... in favor of the sovereign.” *Sossamon v. Texas*, 563 U.S.\_\_\_\_ (2011). Each of the following tests should benefit from a presumption in favor of its broadest application. Even if questioned as to whether the state’s “arguments in this respect are general and speculative,” *Holder v. Humanitarian Law Project*, 561 U.S.\_\_\_\_ (2010)(Breyer, J. dissenting), the state’s assertions of fact with respect to these factors should receive deference when the state is defending itself against corruption, as here, just as much as when defending against violence, as in *Holder*. This Court has recognized the sovereign’s equal “power of self-protection ... whether threatened by force or by corruption.” 290 U.S. 534.

1. *The financial burden on Montana in this suit is potentially great*

*Edelman* held “a federal court’s remedial power, consistent with the Eleventh Amendment ... may not include a retroactive award which requires the payment of funds from the state treasury.” *Coeur*

*d'Alene Tribe* expanded this consideration to bar an injunction concerning future title to property under which "substantially all benefits of ownership and control would shift from the State." 521 U. S. 282. Justice Kennedy's explanation can be equally applied to this case against Montana's officials: "[I]f [Petitioner] were to prevail, [Montana]'s sovereign interest...would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." 521 U. S. 287.

Requiring Montana to enforce a mandate that "candidates [and their supporters] have the constitutional right to purchase their election," *Buckley v. Valeo*, 424 U.S. 1, 260 (1976) (White, J. dissenting) threatens a financial burden on the state and its taxpayers. The purpose and effect of corporate investment in electioneering expenditures is the access and policy it buys for the private interests which profit from them, to the detriment of the state's Treasury. Virtually all Americans agree: "Corporations spend money on politics to buy influence/elect people favorable to their financial interests." *Hart Research* (2010) <http://www.scribd.com/doc/33469294/CitUPoll-PFAW>

While the fiscal impact of money in politics also goes to the merits of this suit, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Maryland*, 535 U.S. 646. Under *Edelman* and *Coeur d'Alene Tribe* any significant impact on the Treasury should defeat *Young* jurisdiction, whatever weight this factor might possess when the First Amendment balance is struck on the merits.

The effect on Montana's Treasury could be enormous. One study found that private expenditures to obtain one federal law yielded a 22,000% return on investment in lost government revenues. Alexander, Mazza, & Scholz, *Measuring Rates of Return for Lobbying Expenditures: An Empirical Analysis under the American Jobs Creation Act* (April 8, 2009). <http://ssrn.com/abstract=1375082>.

Wisconsin Democracy Campaign estimated one state's "graft tax" at about \$1200 per capita for losses to the state from business subsidies allegedly procured with corresponding electioneering expenditures. <http://www.wisdc.org/grafttax2report.php>

Even if not *quid pro quo* corruption, money of all kinds in politics takes a toll on a government's and its taxpayers' finances. The exact toll on Montana's Treasury resulting from transfer of its control from voters to election financiers could easily exceed that from Idaho's loss of lands to the Coeur d'Alene Tribe. E.g. Hacker and Pierson, *Winner Take All Politics: How Washington Made the Rich Richer and Turned Its Back on the Middle Class* (2010).

2. *Special sovereignty interests of Montana are at stake in this suit*

As Justice Kennedy said of the state of Idaho, it can also be said here, where "[t]he dignity and status of its statehood," 521 U. S. 287, is compromised by an "action which implicates special sovereignty interests ... [w]e must examine the effect of the [Petitioners'] suit and its impact on these special sovereignty interests in order to decide whether the *Ex parte Young* fiction is applicable." As in *Coeur d'Alene Tribe*, the Petition



here "seeks relief with consequences going well beyond the typical stakes" and "would bar the State's principal officers from exercising their governmental powers." 521 U. S. 281-82

This is not a case seeking, for example, federal preemption of state law affecting the size of federal benefits supervised by a federal regulator. *Douglas v. Independent Living Center of Southern California, Inc.*, 365 U.S.\_\_\_\_ (2012) (Roberts, C.J., dissenting, would deny *Young* remedy). This suit involves the fundamental relationship between the people and their sovereign state and hence special sovereignty interests well-recognized in this Court's decisions.

State voters uniquely possess a right to a "republican form of government." This right, "guarantee[d] to every state in this union" by the Guaranty Clause, Article IV, §4, assures the state's citizens against the dilution of that "consent of the governed" which legitimizes a republican state. State elections undermined by corruption are inherently not "republican," and thereby violate the constitutional guarantee. This Court has recognized that republican government requires active protection of elections from corruption. The Court's unanimous decision in *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934), read with *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), suggests that states, even more than Congress, possess untrammelled "power to pass appropriate legislation to safeguard ... an election from the improper use of money to influence the result." This is "a vital particular [of] the power of self-protection ... essential to preserve [its] departments and institutions ... from impairment or destruction, whether threatened by

force or by corruption.” 290 U.S. 534, (emphasis added). Cf. *Alden*, 527 U.S. 750-51 (“political accountability ... essential to ... republican form of government”).

The Guaranty Clause compels a state to protect its elective processes against the “two great natural and historical enemies of all republics, open violence and insidious corruption.” *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884). A state “must have the power to protect the elections on which its existence depends from violence and corruption,” the latter being the consequence of “the free use of money in elections, arising” then, as in our own era of increasing inequality, “from the vast growth of recent wealth.” *Id.*, at 657-658, 667. In weighing Montana’s sovereignty interests for determining the availability of *Young*, the extent of “impairment or destruction ... by corruption” of the state’s sovereignty threatened by this suit is a question for the state legislature, not this Court, if the *Young* exception is to be construed narrowly in favor of the sovereign.

The sovereign interest in “safeguard[ing] ... an election from the improper use of money” 290 U.S. 534, could hardly be more profound. “No function is more essential to the separate and independent existence of the States and their governments.” 400 U.S. 124-25. This sovereign concern was aptly summed up by the Governor of Montana when he said “[t]his business of allowing corporations to bribe their way into government has got to stop.” “This is our government and we are not going to allow any corporation to steal it from us.” <http://www.kajl8.com/news/schweitzer-bohlinger-say-i-166-will-keep-corruption-out-of-politics/>

The special sovereign interest described by Governor Schwietzer is at least the equal of the state's interest in title to land under navigable waters involved in *Coeur d'Alene Tribe*. Deference is due this interest when determining whether to intrude upon the sovereignty of the state by displacing 11<sup>th</sup> Amendment immunity.

3. *Alternative constitutional remedies make an unconstitutional remedy unnecessary in this case*

Justice Kennedy observed that “the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights. It is difficult to say States consented to these types of suits in the plan of the convention.” 521 U. S. 272 (citation omitted). The “types of suits” to which the states did give their consent “in the plan of the convention” show that the *Young* doctrine cannot be “accepted as necessary” here.

The Court rejects *Young* when alternative remedies can vindicate federal interests. See *Alden*, 527 U.S. 755-57; *Seminole Tribe*, 517 U.S. 71 n.14; *Federal Maritime*, 535 U.S. 743. As Justice Thomas stated: “The only step [the federal government] may not take, consistent with this Court's sovereign immunity jurisprudence, is to adjudicate a dispute between a private party and a non-consenting State.” *Id.* 768 n.19. Aside from Congress' 14<sup>th</sup> Amendment enforcement powers, the most suitable alternative here is a sovereign plaintiff suit.

“States, in ratifying the Constitution, did surrender a portion of their inherent immunity by

consenting to suits brought by sister States or by the Federal Government." 527 U.S. 755. Justice Kennedy explains that a suit "commenced and prosecuted against a State in the name of the United States ... differs in kind from the suit of an individual." "Suits brought by the United States itself require the exercise of political responsibility." 527 U.S. 755-56.

For a claim barred by Eleventh Amendment immunity due to special sovereign interests, such as *Coeur d'Alene Tribe* or this case, suit by the United States is the proper remedy. See *Idaho v. United States*, 533 U.S. 262, 271 n.4 (2001). The "political responsibility" required for a suit by the United States is especially suitable for a case, as here, where political questions outweigh the marginally justiciable particularized interest of a private suitor, as shown by weighing the following factors:

- the state's fundamental sovereign interest in a republican form of government, guaranteed solely by the elected branches of the United States government;
- Petitioners cannot assert their own particularized rights here but, as explained in *Citizens United* and *Bellotti*, see p. 33 note 3, must invoke the generalized rights of all voters of Montana, who are politically represented by the state;
- Petitioners assertion of the First Amendment rights of others to obtain an advisory opinion on those rights, e.g. *Los Angeles Police Dept. v. United Reporting*

*Publishing Corp.*, 528 U. S. 32, 38–39 (1999), employs a narrow attenuated exception to the general rules of standing required for invoking Article III powers; and

- the voters of Montana demonstrate greater interest in their Guaranty Clause right to an election protected from corrupting interests by the challenged law they and their political representatives enacted, than they do in the rights invoked for them by these Petitioners.

If such “political questions,” see p. 32 note 3, are to be resolved by the judicial branch rather than the legislative branch as would normally be appropriate, suit should at least be initiated, if not authorized, by a department of the United States that can “exercise ... political responsibility.”

## II. THE “ROTE APPLICATION” OF *YOUNG* LACKS DOCTRINAL SUPPORT

*Ex Parte Young* departs from the constitutionally-supported rule that only Congress can abrogate a state's immunity from suit. Justice Scalia provides a textually-supported statement of the rule:

[W]e have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment ... Second, a State may waive its sovereign immunity by consenting to suit.

*College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999)(citations omitted). See also *Virginia Office Prot. & Advocacy v. Stewart*, 563 U.S.\_\_\_\_ (2011) (Scalia, J.) (“absent waiver or valid abrogation, federal courts may not entertain a private person’s suit against a State.”)

Prior to this concise definition, three justices joined Justice Scalia in mentioning “the clutter” and the need for “cleaning up the allegedly muddled Eleventh Amendment jurisprudence.” 491 U. S. 44. Recent decisions have not fully stemmed criticism of Eleventh Amendment immunity jurisprudence as “a hodgepodge of confusing and intellectually indefensible judge-made law.”<sup>2</sup>

The Court has made progress on the problem by limiting the “rote” (*Virginia Office* (Roberts, J.)) or “reflexive,” (521 U. S. 270 (Kennedy, J.)) version of *Young*. Standing on two legs, one contravening the text of the Constitution (“any suit in law or equity”), and the other an “obvious fiction,” *id.*, the rote version of *Young* has outlasted its usefulness. The Court’s own §5, 14<sup>th</sup> Amendment, jurisprudence appropriately

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2 Gibbons, *The Eleventh Amendment and State Sovereign Immunity*, 83 Colum. L. Rev. 1889, 1891 (1983). See Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033 (1983) (“complicated, jerry-built system that is fully understood only by those who specialize in this difficult field”); Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 Hastings Const. Law Q. 721, 723 (2002) (“No coherent theory ... arises from this bizarre quagmire.”); Nguyen, *Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction*, 93 Cal. L. Rev. 587, 595 (2005) (“current mess”); Fruehwald, *The Supreme Court’s Confusing State Sovereign Immunity Jurisprudence*, 56 Drake L. Rev. 253 (2007-08).



denies Congress power to abrogate immunity inconsistent with its textual authority. Incongruously, under the rote version of *Young*, some justices claim the same power denied Congress, without textual support. The Court now divides between justices willing to apply an admitted fiction, allowing rote abrogation of immunity if a suit seeks prospective relief and names officials as individuals, and justices who, as characterized by Justice Souter, 521 U.S. 297, 306, would “redefine the doctrine” to prohibit suits “in fact, against the State,” whoever the suit names.

The existence of “special sovereignty interests” distinguishes this case from *Virginia Office*, the only significant decision in which the Court applied *Young* or discussed 11<sup>th</sup> Amendment issues at any length since *Federal Maritime*. Detailed consideration of *Virginia Office* reveals that the rote application of *Young*, though perhaps convenient, is unnecessary.

*Virginia Office* involved a federally supported investigation of patient deaths in a state hospital, not fundamental sovereignty interests. There was no suggestion of a state policy to kill patients and hide the evidence. *Virginia Office* was more akin to court-assisted civil discovery against errant hospital employees.

The state-agency plaintiff’s investigation was not aimed at high policy-implementing officials such as those sued here. The *Virginia Office* Court heard “no argument that the relief sought in [*Virginia Office*] threatens any similar invasion of Virginia’s sovereignty” as *Coeur d’Alene Tribe* entailed. Accordingly, *Virginia Office*, unlike this case, arguably

fell outside the rule that "[t]he [*Young*] doctrine...does not apply when the state is the real, substantial party in interest" and thus required no fictional disguise for a suit actually against a state. Hence the Court was "satisfied that [*Young* jurisdiction] does not offend the distinctive interests protected by sovereign immunity."

Justices Kennedy and Thomas concurred that *Young* jurisdiction would not violate "special sovereignty interests," but upon more "careful consideration" than undertaken by the principal opinion. Two dissenting Justices, Roberts and Alito, disagreed with that result, but not with the concurrence's closer consideration of sovereignty interests. Justice Roberts explained that "refusing to extend *Ex parte Young* to claims that involve "special sovereignty interests," the Court in *Coeur d'Alene Tribe* warned against a rote application of the *Ex parte Young* fiction." Half of the justices voting in *Virginia Office* agreed that the Court should closely analyze the state's "special sovereignty interests," and avoid a "rote application" of *Young*.

The 2-2 split on the answer such a "careful consideration" should yield indicates how close the question of "special sovereignty interests" was for the four *Virginia Office* justices who reject rote application of *Young*. In view of the substantial grounds for raising the bar of immunity in *Virginia Office*, discussed below, those justices should not consider Montana's vastly more weighty "sovereign interests" threatened in this case even a close question.

In making the inquiry that Chief Justice Roberts advocates for limiting "*Young's* fiction," Justice

Kennedy noted that "the statutory framework in [*Virginia Office*] is unusual in that it vests a state agency itself with federal rights against the State." 563 U.S.\_\_\_\_ (concurring). The majority also acknowledge that the Court had "never encountered such a suit before." 563 U.S.\_\_\_\_ This unlikely case occasioning a state suing itself was the product of a "body-snatcher" legislative scheme for operating a federal program through the nominal persona of a dedicated state agency. Justice Kennedy's reference to this arrangement suggests a valid alternative ground for deciding *Virginia Office*.

Although a state agency in form, with plaintiff's governing body appointed by the state, its budget was provided by the federal government, and it operated pursuant to federal law. A functional analysis could have concluded that the agency's suit was either by the United States, or a state, or both. The 11th Amendment does not bar suits by U.S. sovereign plaintiffs. This hybrid sovereign's suit against its own member state - though unusual - fits comfortably within the sovereign plaintiff exclusion.

*Virginia Office* presented an unusual convergence of all four major strands of legitimate definitional exclusions and constitutional exceptions from Eleventh Amendment immunity. In addition to the exclusions discussed above for a suit, 1) arguably against individuals and not against the state, and 2) brought by a sovereign plaintiff, other arguable grounds included the 3) state consent and 4) 14th Amendment abrogation exceptions.

Congress authorized the *Virginia Office* suit, clearly intending to abrogate the states' immunity. Congress plausibly acted under the 14th Amendment. Agency powers were designed to protect the developmentally-disabled, a population that has suffered discrimination. Exploring this exception would have entailed analysis whether safeguarding the equal protection of this class of citizens enforced valid 14th Amendment rights.

The fourth justification can be analyzed within the framework of waiver doctrine. As Justice Kennedy suggested in *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 400 (1998), waiver of state immunity by lawyers in federal court is doctrinally undeveloped. *Virginia Office* fell within the scope of this developing doctrine. As Justice Kennedy explained, "state law must authorize an agency or official to sue another arm of the State. If States do not wish to see their internal conflicts aired in federal court, they need not empower their officers or agencies to sue one another in a federal forum." He also points out that federal abstention would preclude misinterpreting state law by federally constructed waivers.

Because the legislature could enact, or state courts interpret, state law to foreclose suit against the state in federal Court, "*Young*—a court-made doctrine based on convenience, fiction, or both," Justice Kennedy concludes, "poses no serious affront to state sovereignty in light of the options available to the State." To the extent this concurrence relies on waiver, or the other three textually-supported factors, it rests on constitutional grounds.

*Virginia Office* illuminates a potential redefinition of the *Young* fiction as a "confluence of factors" doctrine. Such an application of *Young* would find justification for its results not in fiction but within the Constitution. A redefined doctrine would hold that constitutionally legitimate factors may cumulatively reinforce one another to allow suit where no single factor raises the bar of immunity.

Since grounds consistent with the Constitution support *Virginia Office's* result, it teaches that rote application of *Young* is unnecessary. *Virginia Office* does not in any event support raising the bar of immunity in this suit against Montana since no one of these four constitutionally valid factors is even arguably present here.

Often through decisive concurrences or key dissents, this Court's decisions support a fully constitutional Eleventh Amendment immunity doctrine. Justice Scalia's statement of the valid exceptions to 11<sup>th</sup> Amendment immunity, informed by Justice Kennedy's understanding of when "suits against state officers are barred ... if the suits are, in fact, against the State," Justice Thomas' rejection of any remedy-based exception, and Justice Roberts' deference to careful analysis of "special sovereignty interests" all support denial of certiorari in this suit.

### III. THE SUPREME COURT'S APPELLATE JURISDICTION IS AS FULLY BOUND BY "ELEVENTH AMENDMENT IMMUNITY" AS IS ITS ORIGINAL JURISDICTION

#### A. Eleventh Amendment Immunity precludes any exception for an appeal from Montana's Supreme Court

"[N]o private person has a right to commence an original suit in this court against a state ... because of the fundamental rule of which the [11th] Amendment is but an exemplification." *Ex parte New York*, No. 1, 256 U.S. 490, 497, 499 (1921).

1. *No textual basis exists for distinguishing this Court's lack of original from its lack of appellate jurisdiction over private suits against a state*

In overturning *Chisholm*, the 11th Amendment made no distinction between the Supreme Court's original jurisdiction and its appellate jurisdiction. It limits the "judicial power" as a whole, which encompasses all heads of jurisdiction. The Court's original jurisdiction is superior to its appellate jurisdiction, which can be stripped by ordinary statute under the Exceptions Clause of Art III. The former cannot. When the text itself makes no distinction between the two, the restriction on the superior original jurisdiction - clearly conceded by the Court - would, *a fortiori*, apply equally to the revocable appellate jurisdiction.



Nothing in the Constitution distinguishes this Court's appellate power over federal suits against States and similar appeals from the highest court of a state. Nor could the text of the Constitution support such a distinction since it nowhere mentions appeals from state courts. The Supreme Court, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816), seized for itself such jurisdiction based on Art. III federal question jurisdiction, which lacks any mention of such appeals.

The same federal question hook that is silent about any appeals from state court will not bear the added weight of authorizing a private appeal against a non-consenting state. The text of the 11th Amendment expressly disallows federal question "power [from] be[ing] construed to" allow such a suit.

2. *Federal question jurisdiction provides no basis for judicial abrogation of immunity*

The theory that federal question jurisdiction supports this Court's hearing a non-consensual private suit against a state, whether on appeal from state court as asserted in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821), or otherwise, has been long undermined by decisions of this Court. This argument violates the 11th Amendment understanding that is more faithful to its text and history set out in *Hans v. Louisiana*, 134 U.S. 1 (1890). See *Union Gas*, 491 U.S. 7 (*Hans* immunizes states from private suits "even where jurisdiction was premised on the presence of a federal question"); *Alden*, 527 U.S. 724 ("*Hans* ... held that sovereign immunity barred a citizen from suing his own State under the federal-question head of jurisdiction");

*Seminole Tribe*, 517 U.S. 170, (Souter, J. dissenting) ("*Hans* Court's broad recognition of immunity in federal question cases"). *Hans* is even more deeply rooted now than when decided over a century ago. This line of authority rejects the concept that federal question jurisdiction can "be construed" to permit breaching a state's immunity from private suit.

Without "circumvent[ing] the constitutional limitations placed upon federal jurisdiction," 517 U.S. 72-73, there is no authority for this Court to entertain this suit. "[A] suit directly against a [non-consenting] State by one of its own citizens is not one to which the judicial power of the United States extends." 491 U.S. at 39 (Scalia, J. dissenting) (citations omitted).

Justice Scalia cited *Cohens* in answer to his rhetorical question, "is [state court] appeal also to be disallowed on grounds of sovereign immunity?" *Virginia Office*, 563 U.S.\_\_\_\_. But Montana's position in this case is distinguishable from *Cohens*. *Cohens* conceded: "[e]ven granting ... that a State cannot be sued in any case; the State is not sued here: she has sued a citizen." 19 U.S. 349-50. Montana neither "commenced" this case in Montana court, nor "prosecuted" it in this Court. *Cohens*' holding would not, on its own facts or reasoning, apply here.

### 3. *A State's use of state courts does not waive its immunity*

On slight authority, Justice Brennan supported a broader reach for *Cohens* with the theory that "when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues."

*McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 26-29 (1990). Cf. 517 U.S. 71, n.14. Such a lax, counter-factual consent rule "affronts" the dignity of a sovereign state.

The current "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." ... [A] State does not consent to suit in federal court merely by consenting to suit in [its own] courts." *College Savings*, 527 U.S. 675 (citations omitted). See *Sossamon v. Texas*, 563 U.S. \_\_\_\_ (2011) ("a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court.") It follows, "if consent to suit in state court is not sufficient to show consent in federal court, ... then Article III would hardly permit this Court to exercise appellate jurisdiction over issues of federal law arising in lawsuits brought against the States in their own courts." *Seminole Tribe*, 517 U.S. 128 (Souter, J. dissenting).

Waiver was never construed from core governmental activities, like elections, rather than peripheral commercial activities, *Parden v. Terminal R. Co.*, 377 U. S. 184, 196 (1964), nor, more recently, under any circumstances at all. See *College Savings*, 527 U.S. 666, 680-84 (overruling the only precedent for *any* constructive waiver of Eleventh Amendment immunity). Recent decisions require that waiver be express, not implied. *Id.*

The Court rejects "a waiver presumed in law and contrary to fact," 521 U. S. 274, as employed in *Parden* and *McKesson*. Constitutional text and contemporary

waiver doctrine preclude such judge-constructed exceptions.

This Court has reined in constructive waivers serving "legislative flexibility." 527 U.S. 690. As Madison understood "the compound republic of America" (The Federalist No. 51, at 323), which is a system of "dual sovereignty," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), the judiciary is not immune from the understanding that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Id. 458. The "'element of ... security" [against tyranny] alluded to by Madison: the division of power between State and Federal Governments," *Printz v. United States*, 521 U.S. 898 (1997), applies equally to the judicial power. If the Petition here were granted on the basis of constructive waiver, it could be as truly said in this case, as the Court said of Congress that "to be governed by the [Supreme Court]'s need for "[judicial] flexibility" is to deny federalism utterly." 527 U.S. 690.

4. *This is not a case where a state has tactically forced a taxpayer to initiate a suit in order to contest asserted tax liability*

*McKesson*, 496 U.S. 26-29, involving a tax alleged to violate the Commerce and Due Process Clauses, applied collection processes requiring advance payment to preserve the right to contest the tax. That procedure deliberately reversed the normal posture of the parties where the state would otherwise be the plaintiff seeking collection of taxes, thereby bringing the state within the rule of *Cohens*. *McKesson* is poorly reasoned, premised on rejected views of federal

question and state waiver, and should be limited to its facts where the state has exerted coercive powers on the plaintiff, specifically to change the litigation posture of the parties, and the suit commenced by the taxpayer against the state is, in fact, the only defense available.

**B. The Tenth Amendment bars judicial insertion in the Constitution of any exception allowing the U.S. Supreme Court to hear private suits against a state**

"The Tenth Amendment ... prohibits the exercise of powers 'not delegated to the United States.'" 521 U.S. 906 n.16 (citation omitted). The Constitution lacks express delegation of authority to hear this case on appeal from the Montana Supreme Court; the 11<sup>th</sup> Amendment intended, by its terms and history, to divide state and federal judicial powers by denying the Supreme Court jurisdiction over this private suit against a state. "[I]n view of the Tenth Amendment ... the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers." *Nevada v. Hall*, 440 U. S. 410, 425 (1979).

While considering the Tenth Amendment's role in reinforcing Montana's immunity from Petitioners' suit, the objective of this suit to prevent enforcement of Montana's election integrity law also bears noting. "Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.... No function is more essential to the[ir] separate and independent existence ... than ... their own machinery

for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970).

Justice Kennedy elucidates why this most essential function is invested with immunity.

"The principle of immunity from litigation assures the states ... from unanticipated intervention in the processes of government." *Great Northern Life Ins. Co. v. Read*, 322 U. S. 47, at 53. When the States' immunity from private suit is disregarded, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." ... When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government. 527 U. S. 750-51.

Justice Kennedy could not address more directly the central issue of this case. Because it directly threatens "political accountability," this is the case for which the 11<sup>th</sup> Amendment was designed. The Montana Supreme Court has described the "individual interests" that were favored prior to enactment of the legislation challenged here. Corruption of Montana's elections - a national scandal etched in the state's history - just as disregard for Montana's immunity, could undermine its "liberty and republican form of government" by distorting it "in favor of individual interests" and foreclosing accountability to voters.



Justice Kennedy explains: "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen."<sup>3</sup> But here the "judicial

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3 These Eleventh Amendment immunity concerns, separating respectively "political process" from "judicial decree," were traditionally addressed through the political question doctrine. Now in apparent decline for separating political from judicial in federal election law, see Barkow, *More supreme than court? The fall of the political question doctrine and the rise of judicial supremacy*, 102 Colum. L. Rev. 237 (2002), the doctrine originally arose in the context of federal-state relations and has heightened implications for federalism.

*Luther v. Borden*, 48 U.S. 1, 47 (1849) held that only elected branches of the federal government – not a federal court – can determine the political question presented there between two competing election processes for legitimizing Rhode Island's government. *Luther* described the political question doctrine as a "boundar[y] which limit[s] the Court's own jurisdiction," as does the cognate Eleventh Amendment immunity doctrine.

*Baker v. Carr*, 369 U.S. 186, 227 (1962) affirmed "those political question elements which render Guaranty Clause claims nonjusticiable." When, as here, minority entrenchment is not the issue, the doctrine may have greater force in a state-federal context, fortified by the Guaranty Clause, than in the purely federal separation of powers context. James Madison would agree. In his discussion of the third resolution of the Virginia Report of 1799 ( [http://constitution.org/rf/vr\\_1799.htm](http://constitution.org/rf/vr_1799.htm) ) he warned that "the judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution." He considered it the "duty" of a state – though not of "the other departments of the government" – to object to usurpation by "the judicial department." Otherwise the "delegation of judicial power would annul the authority delegating it," and by such "usurped powers, subvert [the Constitution] for ever, and beyond the possible reach of any rightful remedy." In discharging Madison's "duty," the

decree" sought by Petitioners is not even "mandated by the Federal Government." If certiorari were granted

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states are empowered by the fact, as Justice Frankfurter wrote, "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what [justices] have said about it." *Graves v. New York*, 306 US 466, 491-92 (1939)(concurring opinion).

Elections present quintessential political questions. *Marbury v. Madison*, 5 U. S.(1 Cranch) 137, 166, 170 (1803) (holding nonjusticiable any "Questions, in their nature political" and subjects which "are political. They respect the nation, not individual rights.") With respect to the rights at issue here, Petitioners are misled by the dissent below in asserting that "corporations have broad rights under the First Amendment . . . to engage in political speech." Pet. 8. This Court ruled the "question [is] not whether corporations 'have' first amendment rights" like "those of natural persons." The rights protected are the broad informational rights of all "members of the public," *First National Bank v. Bellotti*, 435 U.S. 765, 775-76, 777, 783 (1978), and of all "voters [to] be free to obtain information," *Citizens United v. Federal Election Commission*, 558 U.S.\_\_\_\_\_(2010). Such a "generalized grievance" for access to information, if presented by an actual voter, would have been a political question which the voter lacked standing to present and this Court power to hear. *United States v. Richardson*, 418 U.S. 166, 179 (1974). Decision of a political question, resting on nonjusticiable rights that no party did or could have standing to raise, is an advisory opinion.

Under *Marbury*, *Luther*, and *Baker* the United States' interest in this suit must be pursued by a "coordinate political department" possessing, in Article I, §§4&5, a "textually demonstrable constitutional commitment of the issue." The states have independent standing to raise this political question issue in this federalism context. Under Article I and the Guaranty Clause, Congress, not the Court, is empowered to review state election law and "be the judge" of federal elections and the republican nature of state elections.

Eleventh Amendment immunity and political question jurisdictional doctrines thus converge, along with prudential rules, to counsel that the highly political questions in this case should not be resolved through Petitioners' suit against Montana.

here, the Court would infringe sovereign dignity without support from either elected department.

The Court initiated this controversy by overturning provisions of Congress' "Bipartisan Campaign Reform Act of 2002," signed by President Bush. Petitioners note, Pet. 25, the President when *Citizens United* was decided took the unusual step of formally urging Congress to correct the decision. The position Petitioners seek to enforce by ignoring the 10<sup>th</sup> and 11<sup>th</sup> Amendments was not "mandated," but rather opposed by both elected branches.

#### **IV. NO VALID POLICY JUSTIFICATION EXISTS FOR PERPETUATING EXCEPTIONS THAT VIOLATE THE CONSTITUTION**

##### **A. Interest in uniformity or convenience does not outweigh the Constitution**

*Cohens* asserted, "if [a State] commences a suit [in its own Courts] against a citizen ... there must be power in this Court to revise the decision of the State Court, in order to produce uniformity in the construction of the Constitution, &c." 19 U.S. 349-50. But *Federal Maritime* rejects "[t]he constitutional necessity of uniformity" argument. Justice Thomas noted that alternative means of enforcement are available, including a direct suit by the United States against a state. *Federal Maritime* discards the "uniformity" exception to Eleventh Amendment immunity even for a subject, maritime affairs, over which Congress has constitutional power to preempt state law, U. S. Const., Art. I, § 8, cl. 3, *id.*, or even if a "suit is an area ... that is under the exclusive control of

the Federal Government.” 535 US 767-68. If constitutional support for uniformity cannot justify an exception to Eleventh Amendment immunity, “uniformity” has no relevance to Montana’s Tenth Amendment powers over its elections.

This Court commonly reverses decisions without drawing into question its fidelity to constitutional supremacy, although that undermines temporal “uniformity.” For centuries prior to Justice Powell’s decision in *Pittsburgh Press Co. v. Comm’n on Human Relations*, 413 U.S. 376 (1973) the republic survived without any intimation that the “free speech” essential to a free people included the unreliable kind of paid commercial or political speech primarily motivated by corporate profit-seeking. Some temporary geographical diversity in understanding the Constitution’s constraints, if any, on state election finance laws need not raise questions whether state courts interpret conflicting constitutional values in good faith.

*Young*, 209 U.S. 166, justified suits prohibited by the Constitution as “the most convenient ... way in which the rights of all parties can be ... passed upon.” But *Federal Maritime* rejected this rationalization, observing that “our system of dual sovereignty is not a model of administrative convenience,...that is not its purpose.” 535 US 769. Madisonian deterrence of tyranny properly ousts administrative values like convenience and uniformity. 535 US 759-60 (2002).

**B. The Supremacy Clause did not prospectively nullify the 11<sup>th</sup> Amendment**

Another argument for the *Young* fiction is federal supremacy. In *Green v. Mansour*, 474 U.S. 68, 72, the Court sought to rationalize the *Young* Stripping Doctrine's inconsistency with the Constitution. "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief [under] *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."

Alternatives for enforcing federal law, Part I.B.3, belie the "necessity" for ignoring one part of the Constitution in order to give "life" to another part. In the name of the Supremacy Clause, this Court carved a judge-made exception to the 11<sup>th</sup> Amendment. The Supremacy Clause makes the Eleventh Amendment supreme, not the Court's textually unsupported *Young* jurisdiction. Resolution of any conflict between the 11<sup>th</sup> Amendment and the Supremacy Clause would favor the 11<sup>th</sup> Amendment, which, by following, qualified the Supremacy Clause. A more satisfactory resolution is for both provisions to "live" together. As Justice Kennedy explained, "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." 527 U.S. 732-33.

"The Supremacy Clause merely brings us back to the question... whether laws ... violate state



sovereignty and are thus not in accord with the Constitution." 521 U.S. 898. "When a [La[w] ... violates the principle of state sovereignty ... it is ... in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" 527 U.S. 733 (citation omitted). Court rulings are the same as laws.

In any contest between supremacy and state sovereignty, the Constitution has already chosen the winner: for interpretation of federal law, Eleventh Amendment immunity sacrifices some supremacy, uniformity and convenience as lesser values than the dual sovereignty that prevents tyranny. That choice requires honoring Montana's immunity from this private suit.

## CONCLUSION

Congress could have abrogated Montana's immunity from this suit. Article II enforcement of federal law could be deployed against Montana in a suit by the United States. But this Court cannot, in contravention of the 11<sup>th</sup> Amendment, circumvent these constitutional means by which the elected branches may confer upon this Court jurisdiction over a non-consenting state. Contrary fictions have lost doctrinal support. These fictions do not apply in this suit which implicates Montana's essential foundation for its sovereignty, as they did not apply to similar suits.



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## APPENDIX:

11<sup>th</sup> Amendment :

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

**AMICUS  
CURIAE  
BRIEF**

MAY 18 2012

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IN THE  
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*Petitioners,*

*v.*

STEVE BULLOCK,  
ATTORNEY GENERAL OF MONTANA, *et al.*,  
*Respondents.*

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ELECTION COMMISSION OFFICIALS AND  
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IN OPPOSITION TO  
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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION .....	2
REASONS FOR DENYING THE WRIT .....	4
I. <i>CITIZENS UNITED</i> RESTS ON THE ASSERTION THAT INDEPENDENT EXPENDITURES HAVE NO POTENTIALLY CORRUPTING EFFECTS .....	4
II. <i>CITIZENS UNITED</i> HAS ENDED EFFECTIVE LIMITS ON CONTRIBUTIONS TO POLITICAL SPENDING GROUPS .....	8
III. THE EFFECTS OF <i>CITIZENS UNITED</i> DEMONSTRATE THAT INDEPENDENT SPENDING HAS THE POTENTIAL TO CORRUPT .....	14
CONCLUSION .....	27



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	Page(s)
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§ 501(c)(4) .....	11, 12
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§ 109.10(e)(1)(vi) .....	11
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§ 109.20(a) .....	13
§ 109.21 .....	13
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**BRIEF OF AMICI CURIAE FORMER FEDERAL  
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CAMPAIGN FINANCE OFFICIALS  
IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici are former officers and employees of the Federal Election Commission and state and local agen-

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<sup>1</sup> Letters consenting to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or part by counsel for a party. No person or entity other than amici or their counsel made a monetary contribution to this brief's preparation or submission. Amici submit this brief solely in their individual capacities and not on behalf of any organizations or clients.

cies responsible for campaign finance laws. They have devoted substantial parts of their careers to protecting our nation's elections from the corrupting effects of unrestrained financing of political campaigns. Although no longer in government service, they continue to participate actively in the field of campaign finance regulation and are keenly interested in fostering the success of our campaign finance laws. Amici are described and identified in the appendix to this brief.

## INTRODUCTION

Amici are gravely concerned about how broad interpretations of *Citizens United v. FEC*, 130 S. Ct. 876 (2010), affect our system of elected government. Amici are particularly alarmed at the consequences of the view that, under *Citizens United*, electoral expenditures that are independent only in the sense that they are not “coordinated” with a candidate within the narrow meaning of current campaign finance laws and regulations can *never* give rise to corruption or even its *appearance*. The difficulty of proving “coordination” exacerbates the problem.

A broad reading of *Citizens United* has led to the invalidation not only of limits on independent expenditures by corporations and corporate-backed entities, but also of limits on *contributions* by individuals, corporations, and labor unions to political committees that make such expenditures. See *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). The demise of contribution limits for such committees, combined with *Citizens United*'s permission for nonprofit and for-profit corporations, however financed, to make electoral expenditures, has fostered two developments that have already had major effects on elections: the rise of “Super PACs”—political committees that use unlimited

contributions for express advocacy, often devoted exclusively to assisting particular candidates—and the use of purportedly tax-exempt nonprofit corporations to collect unlimited, unreported contributions that are used for political expenditures or passed along to Super PACs (with the true donors' identities concealed).

In the 2012 primaries, Super PACs and nonprofits have raised and spent money on a massive scale, yet the amounts collected and spent to date are only a fraction of those expected in this year's elections. Candidates' increasing reliance on expenditures by outside groups financed by unlimited corporate, union, and individual contributions, as well as the growing strategic symbiosis (but not necessarily illegal "coordination") between the official campaigns and supporting Super PACs and nonprofits, creates opportunities for rampant evasion of limits on contributions to candidates—limits that are a principal bulwark against corruption and its appearance.

Contributors who want to give enough money to buy candidates now have an obvious place to turn: "outside" groups with a publicly stated intent to pour massive sums into supporting those candidates. Official contribution limits, paltry by comparison to the sums now being contributed to these shadow campaign committees, are now readily avoided by all but those who are uninterested in buying influence or cannot afford to do so.

Thus, as Justices Ginsburg and Breyer have observed, events "since this Court's decision in *Citizens United* make it exceedingly difficult to maintain that independent expenditures ... 'do not give rise to corruption or the appearance of corruption.'" *American Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 1307, 1307-

1308 (2012) (statement respecting stay) (quoting *Citizens United*, 130 S. Ct. at 909).

This brief explains the perhaps unintended consequences of *Citizens United*'s broad statements about the supposed inability of independent expenditures to create actual or apparent corruption. It also apprises the Court of recent events, attributable to *Citizens United*, demonstrating the fallacy of the idea that expenditures can never corrupt. Because the decision below takes a realistic view of the potential corrupting influence of "independent" expenditures, reinforced by a factual record concerning political corruption in Montana, amici ask the Court not to review the Montana Supreme Court's judgment. If the Court is inclined to grant review, however, amici urge it not to summarily reverse, which would reinforce an overbroad interpretation of *Citizens United*. If the Court does decide the merits, it should reconsider *Citizen United*'s statements that uncoordinated expenditures cannot corrupt candidates.

## REASONS FOR DENYING THE WRIT

### I. *CITIZENS UNITED* RESTS ON THE ASSERTION THAT INDEPENDENT EXPENDITURES HAVE NO POTENTIALLY CORRUPTING EFFECTS

Critical to *Citizens United*'s ruling that federal prohibitions on corporate political spending were unconstitutional was the Court's conclusion that those prohibitions served no substantial governmental interest. Holding that the laws did not advance the interest in preventing corruption and its appearance—an interest the Court has long recognized as substantial and, indeed, compelling, *see, e.g., FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 500-501 (1985)—the Court asserted that "independent expendi-



tures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909.

The Court's statement was not based on a factual record concerning effects of independent spending, and the Court rejected Congress's contrary findings. Rather, the crux of the Court's analysis was one sentence quoted from *Buckley v. Valeo*, 424 U.S. 1 (1976): "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 130 S. Ct. at 903 (quoting 424 U.S. at 47). The Court also asserted that independent expenditures create no public perception of corruption, because "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials." *Id.* at 910 (citation omitted).

In making these assertions, *Citizens United* repeatedly invoked *Buckley*. But *Buckley* was considerably more cautious and equivocal than *Citizens United* appears to suggest. *Buckley* struck down an expenditure limitation for failing to advance the substantial governmental interest in checking corruption. But it began by stressing the underinclusiveness of the law, which (as construed) allowed unlimited expenditures "to promote [a] candidate and his views" as long as the spender avoided express advocacy. *Buckley*, 424 U.S. at 45. The law thus "permitted unscrupulous persons and organizations to expend unlimited sums of

money in order to obtain improper influence over candidates for elective office.” *Id.* The Court’s underinclusiveness rationale presupposed that independent spending could have a corrupting effect.

The Court went on to say that it was *not yet persuaded* that independent expenditures posed the same threat of corruption as contributions to a candidate. The Court stated that “independent advocacy ... does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.” *Buckley*, 424 U.S. at 46 (emphasis added). Assuming that independent expenditures were necessarily made “*totally* independently of the candidate and his campaign,” the Court stated that “[u]nlike contributions, such independent expenditures *may well* provide little assistance to the candidate’s campaign and indeed *may* prove counterproductive.” *Id.* at 47 (emphases added). These carefully qualified statements preceded the observation, quoted in *Citizens United*, that the absence of prearrangement and coordination “alleviate[d]” the threat of corruption. *Id.* Nowhere did *Buckley* conclude that independent spending must be deemed non-corrupting in all circumstances, regardless of empirical experience to the contrary.

Subsequent decisions similarly avoided categorical assertions that regulations aimed at independent spenders could serve no anticorruption interest. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court upheld the prohibitions on corporate spending for electioneering communications (overruled in *Citizens United*). It also held that soft-money contributions to political parties—and their use for uncoordinated spending to support candidates—could be prohibited because the relationship between candidates and par-

ties made unlimited contributions to parties an effective way to exert corrupting influence on candidates: "It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." *Id.* at 145; see also *id.* at 155.

Even after *Citizens United*, a three-judge district court held that *McConnell's* reasoning sustained these provisions. The court interpreted *McConnell* to hold that

federal officeholders and candidates may value contributions to *their national parties*—regardless of how those contributions ultimately may be used—in much the same way they value contributions to *their own campaigns*. As a result, the reasoning goes, contributions to national parties have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption.

*RNC v. FEC*, 698 F. Supp. 2d 150, 159 (D.D.C. 2010). This Court summarily affirmed. 130 S. Ct. 3544 (2010).

Similarly, recognizing that contributions to non-profit groups whose spending supported a candidate created a threat of corruption, *McConnell* upheld limits on candidates' solicitation of contributions for such groups. The Court understood that such contributions had the same potential to corrupt as contributions to the candidate, even "[t]hough the candidate may not ultimately control how the funds are spent," because, "[w]ithout some restriction on solicitations, federal candidates and officeholders could easily avoid [the Federal Election Campaign Act's] contribution limits by soliciting funds from large donors and restricted

sources to like-minded organizations engaging in federal election activities.” *McConnell*, 540 U.S. at 182-183. *McConnell* recognized that the relationship between candidates and “independent” outside groups is such that outside spending and its financing may present risks of circumvention of limits on contributions to candidates, the most fundamental of anticorruption measures.

Read broadly, however, *Citizens United* seemingly casts aside any possibility that outside spending could improperly influence candidates under any circumstances. Taken literally, the Court’s apparently unqualified statement in *Citizens United* that independent expenditures “do not give rise to corruption or the appearance of corruption,” 130 S. Ct. at 909, suggests that limitations on sources or amounts of funds for outside spending are categorically impermissible.

## II. *CITIZENS UNITED* HAS ENDED EFFECTIVE LIMITS ON CONTRIBUTIONS TO POLITICAL SPENDING GROUPS

On the federal level, a broad reading of *Citizens United* has already led to effective negation of limits on fundraising by outside groups. The resulting fundraising and spending have compellingly demonstrated that *Citizens United*’s premise is wrong. Even expenditures that satisfy legal standards for “independence” can pose direct threats of corruption and apparent corruption.

*Citizens United* led immediately to the D.C. Circuit’s unanimous en banc opinion in *Speechnow.org*, 599 F.3d 686. In *Speechnow.org*, a political committee that planned to engage only in independent expenditures challenged longstanding provisions of the Federal Election Campaign Act (FECA) restricting the amount that

any individual could contribute to the political committee.<sup>2</sup> The plaintiffs argued that the political committee could not corrupt a candidate by spending money to support him, and therefore giving the group money in any amount for such spending also could not cause corruption.

Stating that *Citizens United* “resolves this appeal,” *Speechnow.org*, 599 F.3d at 689, the court of appeals agreed. The court held that limiting contributions to an organization that engaged only in independent expenditures served no valid anticorruption interest:

In light of the [Supreme] Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. ...

Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow.

*Id.* at 694-695 (citation omitted).

The Seventh and Ninth Circuits have agreed that, under *Citizens United*, political committees that en-

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<sup>2</sup> Annual contributions to a non-candidate, non-party committee are limited to \$5,000. 2 U.S.C. § 441a(a)(1)(C). There is an aggregate, inflation-indexed cap on contributions to such committees, now \$46,200 per election cycle. *Id.* § 441a(a)(3)(B); FEC, *Contribution Limits 2011-12*, <http://www.fec.gov/pages/brochures/contrib.shtm#Chart> (visited May 17, 2012).



gage only in independent expenditures may receive unlimited contributions from individuals, corporations, and unions. *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010).

The government did not seek review of *Speechnow.org*, and the FEC issued guidance implementing its holding.<sup>3</sup> The FEC now permits political committees that undertake to make independent expenditures—committees the FEC designates “Independent Expenditure-Only Committees,” more commonly known as “Super PACs”—to accept unlimited contributions from individuals, corporations, labor unions, and other political committees, subject to FECA’s reporting and disclosure requirements.

More recently, the United States District Court for the District of Columbia held that under *Citizens United* and *Speechnow.org*, a political committee that intends to make independent expenditures *and* contribute to candidates may accept unlimited individual, corporate, and union contributions for its expenditures if it places them in a segregated account. *Carey v. FEC*, 791 F. Supp. 2d 121 (2011). The FEC acquiesced, allowing political committees to establish separate accounts for candidate contributions and independent expenditures and use unlimited contributions for the latter.<sup>4</sup> Thus, a committee may now operate simultane-

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<sup>3</sup> FEC Advisory Op. 2010-09 & 2010-11 (July 22, 2010).

<sup>4</sup> See FEC, *Statement on Carey v. FEC*, <http://www.fec.gov/press/Press2011/20111006postcarey.shtml> (Oct. 5, 2011).



ously as a conventional PAC making candidate contributions and a Super PAC collecting unlimited contributions for independent expenditures.

Beyond Super PACs, *Citizens United* also directly enabled nonprofit corporations to use unlimited corporate, union, and individual contributions for independent expenditures. A nonprofit corporation that does not have the "major purpose" of influencing federal elections may make such expenditures without complying with FECA's reporting and disclosure requirements for political committees. See, e.g., *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010).<sup>5</sup> The IRS permits such organizations to claim tax-exemption under 26 U.S.C. § 501(c)(4) and (c)(6) if their "primary purpose" is not to influence elections, and thus does not require them to report donors publicly, as it would if they claimed tax exemption under 26 U.S.C. § 527. *Citizens United* accordingly allows nonprofit organizations to raise and spend funds for direct candidate advocacy, with neither limits on contributions nor effective disclosure requirements.

*Citizens United's* statements that independent expenditures pose no corruption threat have thus created

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<sup>5</sup> FECA requires entities that are not political committees to report contributions used for independent expenditures, see 2 U.S.C. § 434(c)(2)(C), but the FEC construes the requirement to apply only to contributions earmarked for specific outlays, see 11 C.F.R. § 109.10(e)(1)(vi). Thus, contributions used for independent expenditures by nonprofit corporations that are not political committees are almost never reported. A federal district court recently required disclosure of non-earmarked contributions used to finance "electioneering communications," but the ruling does not apply to express-advocacy expenditures. *Van Hollen v. FEC*, 2012 WL 1066717 (D.D.C. Mar. 30, 2012).

two new engines for deploying vast sums for direct candidate advocacy: Super PACs, which devote themselves exclusively to backing candidates and accept the consequence of disclosing contributors; and tax-exempt nonprofit corporations, which maintain the semblance of a primary purpose other than electioneering, but may raise and spend unlimited amounts on candidate advocacy without disclosing their funders. Both allow corporations, unions, and individuals to make contributions to organizations committed to support candidates without regard to limits on amounts and sources of contributions that may be made directly to the candidates.

These two types of organizations may also work in tandem: Affiliated nonprofits and Super PACs allow donors the choice of contributing with or without disclosure.<sup>6</sup> In such circumstances, the nonprofit may pass along funds to the Super PAC, with only the nonprofit reported as the contributor.<sup>7</sup>

Notwithstanding *Buckley's* assumption that outside groups are limited to "totally independent[]"

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<sup>6</sup> The best-known examples of such affiliated groups are American Crossroads, an independent expenditure-only committee, and Crossroads GPS, a 501(c)(4) corporation, both of which make expenditures supporting Republicans and opposing Democrats, including President Obama. On the other side, former Obama aides have formed Priorities USA Action, an independent expenditure-only committee, and Priorities USA, a 501(c)(4) corporation, to support President Obama's reelection.

<sup>7</sup> For example, the pro-Obama Super PAC Priorities USA Action reports that it has received over \$215,000 from its affiliated 501(c)(4), Priorities USA. *Top Organizations Donating to Priorities USA Action, 2012*, [http://www.opensecrets.org/outside\\_spending/contrib.php?cmte=C00495861&cycle=2012](http://www.opensecrets.org/outside_spending/contrib.php?cmte=C00495861&cycle=2012) (visited May 17, 2012).

spending, 424 U.S. at 47, the spending for which such groups may now use funds not subject to contribution limits is only "independent" in the sense that it is not "coordinated" with a candidate, as narrowly defined under FECA and its implementing regulations. See 2 U.S.C. § 441a(a)(7); 11 C.F.R. §§ 109.20, 109.21.<sup>8</sup> An expenditure is "coordinated" only if "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee." 11 C.F.R. § 109.20(a). Expenditures are "coordinated" if they meet detailed content standards, *id.* § 109.21(c), and result from particular "conduct," *id.* § 109.21(d). Such conduct includes a candidate's "request," "suggestion," or "assent" that an expenditure be made; "[m]aterial involvement" by the candidate in creating an election-related communication; "[s]ubstantial discussion" with the candidate about a communication's content; use of common vendors (without a "firewall"); involvement of former campaign employees; or re-publication of the candidate's campaign materials. *Id.*

These coordination regulations, however, are not interpreted by the FEC to preclude involvement of the candidate's close associates, friends, and family in founding or directing an independent-expenditure organization. Nor do they embrace communications developed by sophisticated political operatives consciously to parallel those of the candidate. The coordination rules do not themselves bar a Super PAC from devoting itself *exclusively* to supporting a particular

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<sup>8</sup> A "coordinated" expenditure is treated as a contribution subject to FECA's source and amount limitations. See *Buckley*, 424 U.S. at 46-47.

candidate or from representing to donors that it is “the” Super PAC for that candidate.<sup>9</sup> Nor, according to the FEC, is there anything improper about a candidate or his agents endorsing the efforts of a Super PAC or nonprofit that supports his candidacy, or even directly asking supporters to contribute to the supposedly independent entity: The FEC has ruled that candidates may attend fundraisers for Super PACs and explicitly solicit contributions for them, as long as they say they are asking only for amounts within FECA’s contribution limits.<sup>10</sup>

In short, *Citizens United* created conditions under which candidates may be closely aligned with shadow campaign organizations promoting their election but thinly disguised as “independent” spending groups. These organizations may be endorsed and aided by candidates, and the unlimited corporate, union, and individual contributions they obtain may be perceived as the equivalent of contributions to the candidates themselves.

### III. THE EFFECTS OF *CITIZENS UNITED* DEMONSTRATE THAT INDEPENDENT SPENDING HAS THE POTENTIAL TO CORRUPT

The forces *Citizens United* unleashed have transformed the financing of American elections. That

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<sup>9</sup> The Super PAC *Make Us Great Again*, formed to support the presidential candidacy of Texas Governor Rick Perry, warned donors to “avoid any other group claiming to be ‘the’ pro-Perry independent effort.” *Another Group Helps Rick Perry Out*, <http://thecaucus.blogs.nytimes.com/2011/08/09/another-group-helps-rick-perry-out/> (Aug. 9, 2011).

<sup>10</sup> FEC Advisory Op. 2011-12 (June 30, 2011).

transformation has demonstrated the fallacy of *Citizens United's* assumption that independent expenditures cannot corrupt. By fostering explosive growth of organizations that are closely connected to candidates and political parties and that collect and spend unlimited amounts to support specific candidates, *Citizens United* has altered the relation between "outside" spenders and candidates. The result has been increasing dependence by candidates on extremely large donations to Super PACs and nonprofits, with attendant risks of corruption equivalent to those posed by contributions to the candidates themselves.

The transformation began quickly. Only four months elapsed between the FEC's 2010 publication of advisory opinions allowing the formation of Super PACs and election day. Yet Super PACs spent over \$65 million in the 2010 congressional elections.<sup>11</sup> Non-profit corporations that did not disclose donors spent approximately \$130 million.<sup>12</sup> Overall, outside spending by nonparty groups rocketed to nearly \$305 million in 2010, exceeding outside spending in the 2008 presidential election cycle and dwarfing the \$69 million in outside spending in 2006, the last nonpresidential election cycle.<sup>13</sup>

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<sup>11</sup> *2010 Outside Spending, by Super PACs*, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> (visited May 17, 2012).

<sup>12</sup> *2010 Outside Spending, by Groups*, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U> (visited May 17, 2012).

<sup>13</sup> *Total Outside Spending by Election Cycle, Excluding Party Committees*, [http://www.opensecrets.org/outsidespending/cycle\\_tota.php](http://www.opensecrets.org/outsidespending/cycle_tota.php) (visited May 17, 2012).



In specific, hotly fought contests, outside spending played a critical role. In Illinois's Senate race, nonparty outside spending supporting successful candidate Mark Kirk exceeded \$7 million, significantly more than the \$5.7 million spent by his own party's committees, and more than half as much as the candidate himself spent. The two Crossroads groups alone poured \$5.6 million into supporting Kirk, approximately the same amount as the Republican Party. Likewise, in both the Washington and Colorado Senate races, outside spending in support of both candidates was roughly on par with or in excess of spending by the political parties, and, in the Colorado race, exceeded the amount spent by the Republican challenger on his own campaign. Senate races in Pennsylvania, Nevada, Missouri, California, and other states experienced similar influxes of outside spending.<sup>14</sup>

The changes that began in 2010 have accelerated in 2012. Already, Super PACs have raised over \$200 million—over three times their total for the entire 2010 cycle—and spent almost \$106 million.<sup>15</sup> Super PAC spending is expected to explode in the general election, with the Crossroads Super PAC and its affiliated nonprofit group, Crossroads GPS, planning to raise and spend \$300 million.<sup>16</sup> By comparison, John McCain

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<sup>14</sup> *2010 Outside Spending, by Races*, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=R&pty=A&type=A> (visited May 17, 2012).

<sup>15</sup> *2012 Outside Spending, by Super PACs*, *supra* n.11.

<sup>16</sup> *'Super PAC,' Eyeing General Election*, N.Y. Times, [http://www.nytimes.com/2012/04/09/us/politics/major-republican-super-pac-prepares-to-take-on-obama.html?\\_r=1&amid=tw-nytimes-politics&aid=auto](http://www.nytimes.com/2012/04/09/us/politics/major-republican-super-pac-prepares-to-take-on-obama.html?_r=1&amid=tw-nytimes-politics&aid=auto) (Apr. 8, 2012).



spent a total of \$333 million in the 2008 presidential election.<sup>17</sup> Nonprofit groups so far have spent nearly \$10 million and are reportedly raising large amounts for the general elections, much of it from corporations and other very large donors—including at least one undisclosed \$10 million donor—who prefer to channel spending through groups that do not disclose contributors.<sup>18</sup> Unions are also planning major spending in the general election, using both treasury funds and newly created Super PACs, as well as making contributions (not subject to limits) to other Super PACs.<sup>19</sup>

Simultaneously, outside spending groups have evolved in ways that make ever more apparent their potential to foster corruption. The key development has been the rise of candidate-specific Super PACs, which devote themselves almost exclusively to promoting particular candidates through expenditures that, they claim, are “independent” enough to avoid demonstrable coordination.

Many candidate-specific Super PACs have been formed by individuals closely associated with presidential candidates. Restore Our Future, the Super PAC backing Mitt Romney, was founded by a trio of former staffers from Romney’s 2008 campaign. Make Us Great Again PAC, backing Rick Perry, was founded by

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<sup>17</sup> *Banking on Becoming President*, <http://www.opensecrets.org/pres08/> (visited May 17, 2012).

<sup>18</sup> *Mystery donor gives \$10 million to Crossroads GPS group to run anti-Obama ads*, Wash. Post, Apr. 14, 2012 at A6.

<sup>19</sup> *Unions Finally Make a Showing On Super PAC Stage*, <http://www.opensecrets.org/news/2012/04/very-wealthy-conservative-individus.html> (Apr. 22, 2012).

Perry's former chief of staff. Newt Gingrich's Super PAC, Winning Our Future, was formed by Gingrich's longtime fundraiser. And two Obama aides went directly from White House positions to form the Super PAC supporting the President's reelection, Priorities USA Action, and its affiliated nonprofit group, Priorities USA.<sup>20</sup> These "independent" entities can—and do—host their favored candidates at fundraising events and can receive funding from donors requested by those candidates to contribute to the Super PACs.

Candidate-specific Super PACs have already devoted enormous financial resources to electing their favored candidates. The Romney Super PAC has raised nearly \$52 million, 60% as much as the Romney campaign itself. The Super PAC backing Rick Santorum's presidential bid raised \$8.3 million, 40% as much as the official campaign. And the Gingrich Super PAC raised nearly \$24 million, over a million dollars more than the Gingrich campaign.<sup>21</sup>

Much support for Super PACs has come from very large donors. Through March 31, 2012, more than half of the money raised by Super PACs came from 46 indi-

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<sup>20</sup> These and other relationships between candidates and their Super PACs, too numerous to set forth fully here, are detailed in Democracy 21's report, *Leading Presidential-Candidate Super PACs and the Serious Questions That Exist About Their Legality*, [http://www.democracy21.org/vertical/sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/Democracy\\_21\\_Super\\_PAC\\_Report\\_\\_1\\_4\\_2012.pdf](http://www.democracy21.org/vertical/sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/Democracy_21_Super_PAC_Report__1_4_2012.pdf) (Jan. 4, 2011).

<sup>21</sup> *2010 Outside Spending, by Super PACs*, *supra* n.11 (figures for Super PACs); *2012 Presidential Candidate Fundraising*, <http://www.opensecrets.org/pres12/index.php> (visited May 17, 2012) (figures for campaigns).

viduals, corporations, and organizations that contributed at least \$1 million—including \$25 million from Sheldon and Miriam Adelson, \$13.7 million from Harold and Annette Simmons, and \$6.7 million from Bob Perry.<sup>22</sup> Many Super PAC donors contribute the legal maximum to the candidates' campaigns and turn to Super PACs to increase that support exponentially. As of February 2012, 84% of the contributors to the Romney Super PAC had maxed out their donations to his primary campaign, and Obama supporters who have made the maximum contribution for both the primary and general elections are contributing to pro-Obama Super PACs in increasing numbers.<sup>23</sup>

The candidates have encouraged these contributions and made clear that they regard the resulting influx of big dollars into supportive groups to be the functional equivalent of contributions to their campaigns. Mitt Romney, for example, stated: "We raise money for super PACs. We encourage super PACs. Each candidate has done that."<sup>24</sup> Romney personally partici-

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<sup>22</sup> *Track large donations to super PACs during the 2012 campaign*, USA Today, <http://www.usatoday.com/news/politics/story/2012-06-02/super-pacs-mega-donors/547012701> (visited May 17, 2012).

<sup>23</sup> *Super-PAC donors also maxing out with campaigns, study finds*, The Hill, <http://thehill.com/blogs/ballot-box/fundraising/211777-super-pac-donors-also-maxing-out-with-campaigns-study-finds> (Feb. 21, 2012); *Presidential campaign donors moving to super PACs*, <http://reporting.sunlightfoundation.com/2012/maxed-out-donors/> (Apr. 26, 2012).

<sup>24</sup> *Mitt Romney backs super PACs, but says ads should be accurate*, Wash. Post, <http://www.washingtonpost.com/blogs/election-2012/post/mitt-romney-backs-super-pacs-but-says-ads->

pated in fundraising for Restore Our Future and described a contributor to his Super PAC as having given "to me."<sup>25</sup> Rick Santorum similarly referred to the Super PAC supporting him as "my super PAC."<sup>26</sup>

President Obama's campaign manager, Jim Messina, likewise called on the President's supporters to contribute to the pro-Obama Super PAC:

[T]he campaign has decided to do what we can, consistent with the law, to support Priorities USA in its effort to counter the weight of the GOP Super PAC. ...

Senior campaign officials as well as some White House and Cabinet officials will attend and speak at Priorities USA fundraising events. ...

This decision will help fill a hole on our side. But it's only one part of the overall effort.

Supporting Priorities USA means that our side will not concede the battles on the air ....<sup>27</sup>

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[should-be-accurate/2012/01/17/gIQAvw8k5P\\_blog.html](http://should-be-accurate/2012/01/17/gIQAvw8k5P_blog.html) (Jan. 17, 2012).

<sup>25</sup> *Romney \$1 Million Mystery Corporate Donation*, [http://www.youtube.com/watch?v=rDUELklbY6M&feature=player\\_embedded](http://www.youtube.com/watch?v=rDUELklbY6M&feature=player_embedded) (Aug. 25, 2011).

<sup>26</sup> *Super PAC? What Super PAC?*, Nat'l J., <http://decoded.nationaljournal.com/2012/02/campaign-2012-weve-memorized-t.php> (Feb. 9, 2012).

<sup>27</sup> *We Will Not Play by Two Sets of Rules*, <http://www.barackobama.com/news/entry/we-will-not-play-by-two-sets-of-rules/> (Feb. 6, 2012).

Reportedly, the President “personally signed off on his campaign’s decision to actively encourage donations to Democratic Super PAC Priorities USA.”<sup>28</sup>

Most striking, Newt Gingrich, when ending his campaign, singled out his Super PAC’s largest backers for special thanks: “[I]t would be impossible for me to be here and thank everybody without mentioning Sheldon and Miriam Adelson, who single-handedly came pretty close to matching Romney’s Super PAC, and I’m very, very grateful to them.”<sup>29</sup>

These developments are not limited to presidential campaigns. Congressional races are even more susceptible to outside spending, as infusions of a few million dollars or less can have a decisive effect in such races.<sup>30</sup> Candidate-specific Super PACs have made their appearance in congressional races, and other Super PACs and nonprofits are planning major outlays in many races.<sup>31</sup> Already, Super PACs outspent their favored

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<sup>28</sup> *Obama signs off on Super PAC donation encouragement*, [http://firstread.msnbc.msn.com/\\_news/2012/02/07/10843546-obama-signs-off-on-super-pac-donation-encouragement](http://firstread.msnbc.msn.com/_news/2012/02/07/10843546-obama-signs-off-on-super-pac-donation-encouragement) (Feb. 7, 2012).

<sup>29</sup> *Newt Gingrich to Adelson: Thanks for the Cash*, <http://abcnews.go.com/Politics/video/newt-gingrich-sheldon-adelson-cash-16263913> (May 2, 2012).

<sup>30</sup> *Super PACs Already Spending Big*, *Am. Prospect*, <http://prospect.org/article/super-pacs-already-spending-big> (May 8, 2012).

<sup>31</sup> *Super PACs, Conservatives Lead Surge In Independent Spending On Congressional Races*, *Huffington Post*, [http://www.huffingtonpost.com/2012/05/10/super-pacs-congress-races-conservatives\\_n\\_1507345.html?ref=elections-2012](http://www.huffingtonpost.com/2012/05/10/super-pacs-congress-races-conservatives_n_1507345.html?ref=elections-2012) (May 10, 2012).



candidate in the Indiana Senate primary.<sup>32</sup> As the general elections approach, candidates across the country will rely on similar support.

To paraphrase Judge Kavanaugh's *RNC* opinion dealing with political-party soft money, the evidence is compelling that "federal officeholders and candidates may value contributions to" Super PACs "in much the same way they value contributions to *their own campaigns*," and thus Super PAC contributions "have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption." 698 F. Supp. 2d at 159.

That candidates today consider outside spending groups, fueled by unlimited contributions, to be essential to their efforts refutes *Buckley's* speculation that "such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. Experience in the new era of unrestrained Super PAC fundraising and spending contradicts any notion that candidates find such spending embarrassing or useless. Rather, candidates openly encourage donations to "their" Super PACs. The professional political operatives—with longstanding ties to the candidates—who direct those Super PACs are adept at echoing the themes and strategies of the candidates' campaigns. As Steven Law, president of the Crossroads groups, candidly stated, "People have just gotten a lot better about telegraphing their intentions in a way that doesn't create

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<sup>32</sup> *Super PACs outspend favorite candidate in Indiana Senate race*, <http://www.iwatchnews.org/2012/06/07/8826/super-pacs-outspend-favorite-candidate-indiana-senate-race> (May 7, 2012).



any legal problems, and doesn't give away too much to the other side."<sup>33</sup> Rick Tyler, the former Gingrich aide heading the pro-Gingrich Super PAC, said, "I follow my lead from Newt Gingrich .... I watch what he says on TV. I read about him in the newspaper."<sup>34</sup>

The nominal independence of outside spending groups has proved particularly useful to the official campaigns, which have allowed Super PACs and non-profit corporations to take the lead in highly effective negative advertising while denying any responsibility for such attacks.<sup>35</sup> A Wesleyan University professor who documented the overwhelming prevalence of negative advertising by outside groups explains that, "[a]s candidates, you do want to outsource some of the negativity."<sup>36</sup>

Nor do the facts support the supposition that the "absence of prearrangement" of outside spending will obviate possible corruption. *Citizens United*, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47). Although coordination rules forbid prearrangement of *particular expenditures*, there are ample opportunities for quid pro quo arrangements when contributors seeking to

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<sup>33</sup> *Cash-Rich Republicans Prepare to Attack*, Fin. Times, <http://www.cnbc.com/id/47349129> (May 9, 2012).

<sup>34</sup> *Attack of the Super PACs*, Time, Jan. 23, 2012, at 28.

<sup>35</sup> See Brooks & Murov, *Assessing Accountability in a Post-Citizens United Era*, 40 Am. Politics Research 383 (2012).

<sup>36</sup> *Do Campaign Ads Seem More Negative This Year? It's Not Just You*, NPR: All Things Considered, <http://www.npr.org/blogs/itsallpolitics/2012/05/09/151956988/do-campaign-ads-seem-more-negative-this-year-its-not-just-you> (May 3, 2012) (quoting Erika Fowler).

support a candidate in return for preferential treatment can be steered to give *unlimited* sums to organizations committed to support the candidate. The potential for illicit quid pro quo arrangements, or their appearance, is much greater when millions of dollars are at stake than when a contributor merely wants to give a few thousand dollars directly to a campaign.<sup>37</sup> The free-for-all created by *Citizens United* threatens circumvention on a massive scale of contribution limits, the fundamental anticorruption measure that this Court has consistently upheld.

The direct consequences of *Citizens United* have thus undermined its premise that independent expenditures cannot corrupt candidates. Judge Richard Posner, surveying the fallout, recently observed:

The Supreme Court allows donations to political campaigns to be regulated (and limited) because of fear that donations unlimited in amount corrupt the political process, because the candidate recipient knows that a donor of a large amount of money expects something in return, usually favorable consideration of a policy that would benefit the donor, and hence a

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<sup>37</sup> According to press reports, Sheldon Adelson not only met with Newt Gingrich while he was providing critical support for the pro-Gingrich Super PAC, but also communicated with Mitt Romney about similar support should Romney become the nominee. See *Gingrich Patron Could Have a Plan B: Romney*, N.Y. Times, Feb. 5, 2012, at A1. It takes little imagination to conclude that when multi-million-dollar donors talk privately with the candidates they sponsor, there is an *opportunity* for actual or apparent quid pro quo corruption. Although some will resist the urge to ask for some commitment in exchange for their massive financial support, others will not exercise such restraint.

large donation is likely to be a tacit bribe. But the Court, rather naively as it seems to most observers, reasoned in the *Citizens United* case that the risk of corruption would be slight if the donor was not contributing to a candidate or a political party, but merely expressing his political preferences through an independent organization such as a super PAC—an organization neither controlled by nor even coordinating with a candidate or political party.

The criticisms of the Court's reasoning are several. First, the notion of "coordination" is vague, and tacit coordination with a candidate or a party seems to occupy the same never-never land as tacit collusion in antitrust law. It can be quite effective yet is hard to condemn as actual coordination. Allies of the candidate or members of the party can run the super PAC, and without even talking to the candidate or to party officials can figure out what kind of political advertising will be helpful to the candidate. ...

It thus is difficult to see what practical difference there is between super PAC donations and direct campaign donations, from a corruption standpoint. A super PAC is a valuable weapon for a campaign... ; the donors to it are known; and it is unclear why they should expect less quid pro quo from their favored can-

didate if he's successful than a direct donor to the candidate's campaign would be.<sup>38</sup>

As Judge Posner explains, the unreality of the notion of "totally independent" spending and the great value of such spending to today's candidates means that large-scale spending by outside groups and the contributions that support it are the functional equivalent of candidate contributions.

The public rightly agrees with Judge Posner. In a recent national poll by the independent Opinion Research Corporation, 69% agreed that "new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption," while 73% said "there would be less corruption if there were limits on how much could be given to Super PACs."<sup>39</sup> Sixty-five percent of respondents said they trust government less because donors to Super PACs have more influence than average voters, and 26% said they were less likely to vote as a result.<sup>40</sup> Far from "presuppos[ing]" the "ultimate influence" of the voters, as *Citizens United* posited, 130 S. Ct. at 910, the perception of corruption fostered by candidates' reliance on big-money donors to "independent" spending groups directly harms our political system.

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<sup>38</sup> Posner, *Unlimited Campaign Spending—A Good Thing?*, The Becker-Posner Blog, <http://www.becker-posner-blog.com/2012/04/unlimited-campaign-spending-a-good-thing-posner.html> (Apr. 8, 2012).

<sup>39</sup> *National Survey: Super PACs, Corruption, and Democracy*, [http://www.brennancenter.org/content/resource/national\\_survey\\_super\\_pacs\\_corruption\\_and\\_democracy](http://www.brennancenter.org/content/resource/national_survey_super_pacs_corruption_and_democracy) (Apr. 24, 2012).

<sup>40</sup> *Id.*

## CONCLUSION

Denying certiorari would send a welcome message that *Citizens United* should not be read overbroadly. In the alternative, amici urge the Court to grant plenary review in which those broad statements, and other critical premises of *Citizens United*, may be reconsidered. The Court should deny the petition for a writ of certiorari or reject petitioners' request for summary reversal and set the case for briefing and oral argument.

Respectfully submitted.

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## **APPENDIX**



# LIST OF AMICI CURIAE

Trevor Potter was appointed a Commissioner of the Federal Election Commission by President George H. W. Bush in 1991 and served as Chairman in 1994. He has also served as legal counsel to three Republican presidential campaigns, and is currently head of the Political Law practice at Caplin & Drysdale, chartered in Washington, D.C.

Frank P. Reiche was appointed to the Federal Election Commission by President Carter, where he served from 1979 to 1985 and was Chairman in 1982. Before that, he served as Chairman of the New Jersey Election Law Enforcement Commission from 1973 to 1979.

Lawrence M. Noble was General Counsel of the Federal Election Commission from 1987 to 2000 and Executive Director of the Center for Responsive Politics from 2000 to 2006. He currently practices political law and is an adjunct professor at George Washington University Law School, where he teaches campaign finance law.

Charles N. Steele served as General Counsel of the Federal Election Commission from 1979 to 1987. Prior to that he served the Commission as Deputy Assistant General Counsel and Associate General Counsel for Enforcement and Litigation from 1977 to 1979, and as Acting General Counsel in 1979.

Jeffrey B. Garfield served as the Executive Director and General Counsel of the Connecticut Elections Enforcement Commission for more than 30 years before retiring in 2009. He successfully implemented the most comprehensive campaign finance reform legislation in

the United States and is now is a solo practitioner in Connecticut handling political clientele.

Nicole A. Gordon was the founding Executive Director of New York City's pioneer Campaign Finance Board for eighteen years, building it into a nationally recognized model and the largest public funding program in the United States after that of the federal government. She is a consultant to New York State and adjunct professor at the NYU Wagner School of Public Service where she teaches Law and Public Policy.

Robert M. Stern was General Counsel of the California Fair Political Practices Commission and is the former President of the Los Angeles-based Center for Governmental Studies.

**AMICUS  
CURIAE  
BRIEF**

*In The*  
**Supreme Court of the United States**

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AMERICAN TRADITION PARTNERSHIP, INC.,  
CHAMPION PAINTING, INC., AND MONTANA  
SHOOTING SPORTS ASSOCIATION, INC.,

*Petitioners,*

*v.*

STEVE BULLOCK, ATTORNEY GENERAL OF THE  
STATE OF MONTANA, AND COMMISSIONER OF THE  
COMMISSION FOR POLITICAL PRACTICES,

*Respondents.*

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On Petition For A Writ Of Certiorari  
To The Supreme Court Of The State Of Montana

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**BRIEF OF AMICI CURIAE THE MONTANA TRIAL  
LAWYERS ASSOCIATION, THE MONTANA  
CONSERVATION VOTERS, THE MONTANANS  
FOR CORPORATE ACCOUNTABILITY, AND  
THE MONTANA LEAGUE OF RURAL VOTERS  
IN SUPPORT OF RESPONDENTS**

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**QUESTION PRESENTED**

Are States allowed to regulate corporate political speech more broadly by the Fourteenth Amendment than Congress is allowed to regulate such speech by the First Amendment?

## TABLE OF CONTENTS

	Page
Question Presented .....	i
Table of Authorities .....	iii
Interest of the <i>Amici Curiae</i> .....	1
Summary of Argument .....	2
Argument.....	4
I. <i>Citizens United</i> is Not <i>Stare Decisis</i> on the Constitutional Issue Here .....	4
A. <i>Citizens United</i> .....	4
B. Fourteenth Amendment Incorpora- tion Analysis .....	5
II. Montana's Regulation of Corporate Speech is Permissible Under the Four- teenth Amendment .....	8
A. <i>Bellotti</i> .....	8
B. The Question of Corporate "Personhood" ...	12
1. Early Constitutional History.....	12
2. The Passage of the Fourteenth Amendment .....	14
3. Corporate Assertions of "Person- hood" .....	15
4. This Court's Declaration of Corpo- rate Personhood .....	17
C. The Reasonableness of the Montana Law .....	20
Conclusion.....	22



## TABLE OF AUTHORITIES

	Page
CASES	
<i>Bank of Augusta v. Earle</i> , 38 U.S. (13 Pet.) 519 (1839).....	14, 16
<i>Bank of the United States v. Deveaux</i> , 9 U.S. (5 Cranch) 61 (1809).....	13
<i>Citizens United v. Federal Election Commis- sion</i> , ___ U.S. ___, 130 S.Ct. 876 (2010) .....	<i>passim</i>
<i>Conn. General Co. v. Johnson</i> , 303 U.S. 77 (1938).....	19
<i>County of San Bernardino v. Southern Pac. R. Co.</i> , 118 U.S. 417 (1886).....	18
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	12
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978).....	<i>passim</i>
<i>Hague v. C. I. O.</i> , 307 U.S. 496 (1939) .....	7
<i>Home Ins. Co. v. State of New York</i> , 119 U.S. 129 (1886).....	19
<i>Insurance Co. v. City of New Orleans</i> , 13 Fed. Cas. 67 (C.C. La. 1870) .....	15, 16, 17
<i>McDonald v. City of Chicago, Ill.</i> , ___ U.S. ___, 130 S.Ct. 3020 (2010).....	3, 6, 7
<i>Minneapolis &amp; St. L. Ry. Co. v. Beckwith</i> , 129 U.S. 26 (1889).....	19
<i>Missouri Pac. Ry. Co. v. Mackey</i> , 127 U.S. 205 (1888).....	19

## TABLE OF AUTHORITIES – Continued

	Page
<i>Paul v. Virginia</i> , 75 U.S. 168 (1868) .....	7, 14, 16
<i>Santa Clara County v. Southern Pacific Railroad Co.</i> , 118 U.S. 394 (1886) .....	17, 18, 19
<i>Slaughter-House Cases</i> , 16 Wall. 36 (1873) .....	6
<i>Trustees of Dartmouth College v. Woodward</i> , 17 U.S. (4 Wheaton) 518 (1818) .....	13
<i>United States v. Cruikshank</i> , 92 U.S. 542 (1876) .....	6
<i>Western Tradition Partnership, Inc. v. Attorney General of the State of Montana</i> , 363 Mont. 220, 271 P.3d 1 (2011) .....	9, 10, 20
<i>Wheeling Steel Corp. v. Glander</i> , 337 U.S. 562 (1949) .....	19

## U.S. CONSTITUTION

Privileges and Immunities Clause in Art. IV, § 2 .....	6, 7, 14
U.S. Const., Amend. XIV, § 1 .....	<i>passim</i>

## OTHER AUTHORITIES

Antieau, <i>The Intended Significance of The Fourteenth Amendment</i> (1997) .....	14, 15
Charles Cullen, <i>The Fourteenth Amendment And The States</i> (1912), p.127 .....	15
Graham, <i>An Innocent Abroad: The Constitutional Corporate "Person,"</i> 2 U.C.L.A. L. Rev. 155, 166-167 (Feb. 1955) .....	14

## TABLE OF AUTHORITIES – Continued

	Page
Greenwood, <i>Essential Speech: Why Corporate Speech is Not Free</i> , 83 Iowa L. Rev. 995 (1998).....	20, 21, 22
James, <i>The Framing of the Fourteenth Amendment</i> (1965), p.179 .....	15

## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

Montana Conservation Voters (MCV) is an incorporated, Montana-based organization with 2200 dues-paying members. MCV advocates for responsible stewardship of the State's natural resources, supports political candidates, and promotes citizen involvement in Montana's political process.

The Montana League of Rural Voters is an incorporated, Montana-based, nonprofit membership organization. The League promotes protection of family farms and ranches and works to expand voting rights for traditionally disadvantaged rural populations.

Montanans for Corporate Accountability (MCA) is a project of the Policy Institute, a nonprofit "think tank" which works primarily on energy and tax issues. MCA seeks to strengthen democracy and local Montana economies by curbing the excessive power of large corporations.

The Montana Trial Lawyers Association (MTLA) is a membership organization of more than 500

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<sup>1</sup> No counsel for a party to this action authored the *amici curiae*'s brief, in whole or in part. No party, no counsel for a party, and no person other than *amici* and their counsel have made a monetary contribution intended to fund the preparation or submission of this brief.

The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

Montana attorneys. Its members seek just results for the injured, the accused, and those whose rights are jeopardized. It frequently serves as an *amicus curiae* on constitutional issues.

The *amici* all are committed to preserving the integrity of the democratic process in Montana. They all believe that Montana's campaign finance and disclosure laws are essential for the protection of that process. They believe that those laws, and the Montana Supreme Court's recent decision upholding them, are consistent with the Fourteenth Amendment to the U.S. Constitution.

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## SUMMARY OF ARGUMENT

Petitioners seek a summary reversal, invoking the doctrine of *stare decisis*. They claim that this case is directly controlled by *Citizens United v. Federal Election Commission*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 876 (2010). Thus, they contend that the Montana Supreme Court's decision "flout[s] this Court's holdings . . . in a willful and transparent fashion." (Petition, pp. 21, 32)

Petitioners ignore a crucial distinction. *Citizens United* was a First Amendment case, involving Congressional restrictions on corporate speech. The present case arises under the Fourteenth Amendment and deals with state power to place restrictions on such speech.

That distinction is vital because of differences on this Court concerning the Fourteenth Amendment's incorporation of the Bill of Rights against the States. Justice Thomas does not accept the substantive due process analysis which has long been utilized by the Court. He maintains that Fourteenth Amendment review of state legislation should be based on the Privileges and Immunities Clause. See *McDonald v. City of Chicago, Ill.*, \_\_ U.S. \_\_, 130 S.Ct. 3020, 3058-88 (2010) (Thomas, J., concurring in part and concurring in the judgment).

Corporations are not rights-bearers under the Privileges and Immunities Clause. That clause applies to "citizens," not to "persons." Thus, under Justice Thomas's principles, the Fourteenth Amendment cannot incorporate corporations' First Amendment rights.

Subtracting Justice Thomas from the *Citizens United* majority leaves that opinion as a *minority* opinion in the Fourteenth Amendment context. Most members of this Court presumably would permit States reasonably to regulate political speech by corporations. This Court accordingly should allow the Montana Supreme Court's decision to stand.

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## ARGUMENT

### I. **CITIZENS UNITED IS NOT STARE DECISIS ON THE CONSTITUTIONAL ISSUE HERE.**

#### A. *Citizens United*

In *Citizens United*, this Court voted 5-4 to strike down provisions of the federal Bipartisan Campaign Reform Act. The Court declared that “First Amendment protection extends to corporations” and that “political speech does not lose First Amendment protection ‘simply because its source is a corporation.’” *Id.* at 899-00.

*Citizens United* held that Congress could not ban independent corporate expenditures to influence elections. It stressed the burden imposed by onerous federal regulations which were promulgated under the Act. *Id.* at 897-98. It rejected the federal government’s argument that corporate expenditures can distort debate and can create corruption or the appearance of corruption. *Id.* at 904-09.

Four justices filed a dissent. They agreed that “corporations are covered by the First Amendment,” but argued that “reasonable restrictions on corporate electioneering” are permissible. *Id.* at 952 (Stevens, J., dissenting). They argued that the public interest in preventing corruption justifies treating corporate speech differently from individual speech. *Id.* at 961-68.

The dissenters also argued that unrestricted corporate expenditures can “drown out noncorporate voices” and unfairly influence elections:

[W]hen corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears “little or no correlation” to the ideas of natural persons or to any broader notion of the public good. [citation omitted] *The opinions of real people may be marginalized. . . .*

In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter. Corporate “domination” of electioneering [citation omitted] can generate the impression that corporations control our democracy. *When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy.*

*Id.* at 974 (emphasis added).

These persuasive reasons justify state regulation of corporate speech. The absolutism of *Citizens United* does not govern analysis under the Fourteenth Amendment. This will be explained below.

## **B. Fourteenth Amendment Incorporation Analysis**

Shortly after *Citizens United*, this Court decided a benchmark case on Fourteenth Amendment

incorporation of the Bill of Rights. The justices comprising the *Citizens United* majority held that the Second Amendment's right to bear arms applies to the States. See *McDonald v. City of Chicago, Ill.*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3020 (2010).

Four justices based their holding on substantive due process. See *id.* at 3030 to 3050. Justice Thomas, however, declined to endorse that reasoning. He took issue with the entire concept of substantive due process:

[A]ny serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does.

\* \* \*

*I cannot accept a theory of constitutional interpretation that rests on such a tenuous footing. This Court's substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle.*

*Id.* at 3062 (Thomas, J., concurring in part and concurring in the judgment (emphasis added)).

Justice Thomas proposed that Fourteenth Amendment review of state legislation should be based not on the Due Process Clause but on the Privileges and Immunities Clause. He declared that that clause improperly was truncated by the *Slaughter-House Cases*, 16 Wall. 36 (1873), and by *United States v.*

*Cruikshank*, 92 U.S. 542 (1876), and that those precedents should be reversed. *Id.* at 3084-88. He concurred with the result in *McDonald* based on the Privileges and Immunities Clause. *Id.* at 3088.

Justice Thomas's position on Fourteenth Amendment jurisprudence is pivotal here. Corporations are not rights-bearers under the Privileges and Immunities Clause. That clause holds: "No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States." U.S. Const., Am. XIV, § 1 (emphasis added).

It is long settled that corporations are *not* citizens, and that the Privileges and Immunities Clause does not apply to them. *Hague v. C. I. O.*, 307 U.S. 496, 514 (1939). See also *Paul v. Virginia*, 75 U.S. 168, 181 (1868) ("The term citizens . . . applies only to natural persons" under the parallel Privileges and Immunities Clause in Art. IV, § 2).

On Justice Thomas's principles, therefore, *Citizens United* must be limited to corporate speech rights vis-à-vis Congress under the First Amendment. *Citizens United* cannot govern the States, since corporate rights are not incorporated under the Fourteenth Amendment.

The *Citizens United* majority opinion, thus, is a minority opinion on the question presented here. Only four signers of that opinion support a Fourteenth Amendment analysis under which it could be applied to the States. *Citizens United* therefore does

not have the force of *stare decisis* on the question presented here.

## II. MONTANA'S REGULATION OF CORPORATE SPEECH IS PERMISSIBLE UNDER THE FOURTEENTH AMENDMENT.

### A. *Bellotti*

A point of departure for Fourteenth Amendment analysis of corporate political speech is *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, this Court struck down a state law prohibiting corporate expenditures on ballot issues. The Court held that such expenditures were protected by reason of the public's interest in being informed. It stressed that it was *not* deciding whether corporations have "the full measure of rights that individuals enjoy under the First Amendment." *Id.* at 777.

*Bellotti*, moreover, cautioned that state laws restricting corporate speech might be justified on an appropriate record. It stated:

Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance. [citations omitted] Preservation of the individual citizen's confidence in government is equally important. [citations omitted]

\* \* \*

According to appellee, corporations are wealthy and powerful and *their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.* [citations omitted] *But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts. . . .*

*Id.* at 789 (emphasis added).

In the present case, there is evidence showing that "the relative voice of corporations has been overwhelming in influencing referenda." 95% of campaign spending on recent Montana ballot issues came from corporations and other institutional donors. *Western Tradition Partnership, Inc. v. Attorney General of the State of Montana*, 363 Mont. 220, 271 P.3d 1 (2011), ¶ 38.

Those figures, combined with other evidence of record, show that "corporate advocacy threaten[s] imminently to undermine democratic processes." Cf. *Bellotti*, 435 U.S. at 789. The Montana Supreme Court held:

Montana, with its small population, enjoys political campaigns marked by person-to-person contact and a low cost of advertising



compared to other states. . . . [A]llowing unlimited expenditures of corporate money into the Montana political process would drastically change campaigning by shifting the emphasis to raising funds.

\* \* \*

Montana politics is more susceptible to corruption than Federal campaigns, and . . . infusions of large amounts of corporate independent expenditure on just media coverage "could accomplish . . . corruption of Montana politics. . . ."

\* \* \*

Issues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government.

*Western Tradition Partnership*, ¶¶ 30, 31, 37.

The present case, thus, involves precisely the sort of record that the *Bellotti* majority indicated would support restrictions on corporate speech. Montana law satisfies a Fourteenth Amendment standard of "reasonable regulation," using the *Bellotti* case as a benchmark.

It should be noted that four dissenters in *Bellotti* would have allowed the States broad authority to

limit corporate speech. Justice White (joined by Justices Brennan and Marshall) discussed the nature of corporations and argued:

[C]orporate expenditures designed to further political causes lack the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech provided by the First Amendment. Ideas which are not a product of individual choice are entitled to less First Amendment protection.

\* \* \*

[T]he interest of Massachusetts and the many other States which have restricted corporate political activity is . . . [in] *preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process. . . .* Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas.

*Id.* at 807, 809-10 (emphasis added).

Justice Rehnquist also dissented in *Bellotti*. He cited constitutional history and the nature of corporations to justify broad regulation by the States. He stated, *inter alia*:

A State grants to a business corporation the blessings of potentially perpetual life and

limited liability to enhance its efficiency as an economic entity. *It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. . . .* Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.

\* \* \*

*The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity.*

*Id.* at 826-28 (emphasis added).

## B. The Question of Corporate "Personhood"

### 1. Early Constitutional History

When analyzing constitutional rights, this Court lays stress on their historical background. As Justice Scalia stated in *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008): "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."

In the case of corporations, history demonstrates that the people did *not* understand them to have constitutional rights. This was true both at Founding and at the time of ratification of the Fourteenth Amendment.

Shortly prior to the Founding, the English Parliament had granted monopolistic corporate charters to companies such as the East India Company. Those companies used them to the detriment of local colonial businesses. The charters and the laws that favored them are recognized as principal factors that led to the American Revolution.

Neither the Constitution nor the Bill of Rights mentions corporations. Their legal status was summed up by Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheaton) 518, 636 (1818) as follows:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. . . . Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person.

For nearly a century, this Court rejected claims of constitutional rights for corporations. See, e.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 88, 91 (1809) (a corporation, such as the Bank of the

United States, was neither a "citizen" nor a "person" for the purposes of Article III of the Constitution); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586-87 (1839) (corporations are not "citizens" for the purposes of the Privileges and Immunities Clause of Article IV of the Constitution); *Paul v. Virginia*, 75 U.S. 168, 19 L.Ed. 357 (1868) (same).

## 2. The Passage of the Fourteenth Amendment

The Fourteenth Amendment became part of the Constitution in 1868. The intended significance of the Amendment was well documented at the time. See, e.g., Antieau, *The Intended Significance of The Fourteenth Amendment* (1997); Graham, *An Innocent Abroad: The Constitutional Corporate "Person,"* 2 U.C.L.A. L. Rev. 155, 166-67 (Feb. 1955).

In 1866, the Joint Conference Committee on Reconstruction, the Congressional Committee that proposed the Amendment, reported to members of Congress and to the public. The report made clear that the purpose of the Amendment was to protect the rights of African-American citizens newly released from slavery:

It was impossible to abandon them without securing them their rights as free men and citizens. The whole civilized world would have cried out against such base ingratitude, and the bare idea is offensive to all right-thinking men. Hence it became necessary to

inquire what could be done to secure their rights, civil and political.

See Antieau, *op. cit.*, pp. 6-7.

A review of records of the State legislatures that ratified the Amendment confirm that this was the purpose intended by the people. Thus, *e.g.*, Pennsylvania legislators stated: "the object of the first clause [Section 1 of the Fourteenth Amendment] was to meet the doctrine enunciated in the somewhat celebrated Dred Scott decision;" and "the purpose of this privilege is universally conceded to be, to confer citizenship upon the four or five million Negroes residing in this country – not only federal citizenship, but State citizenship also." See *id.*, pp. 5-9.

### 3. Corporate Assertions of "Personhood"

Corporations began to assert that the term "person" in the Due Process Clause of the Fourteenth Amendment also included them. However, nothing in the records suggests that Congress intended to grant such corporate personhood. Legal scholars who have studied this assertion emphatically have rejected it. See, *e.g.*, Antieau, pp. 339-41; Charles Cullen, *The Fourteenth Amendment And The States* (1912), p.127; James, *The Framing of the Fourteenth Amendment* (1965), p.179.

A circuit court holding shortly after the Amendment's passage confirms this interpretation. In *Insurance Co. v. City of New Orleans*, 13 Fed. Cas. 67 (C.C. La. 1870), a New York insurance company



argued that New Orleans' foreign license tax violated the Amendment. The company argued that it was a "citizen" covered by the Privileges and Immunities Clause, and a "person" covered by the Equal Protection Clause.

Relying on the U. S. Supreme Court's holdings in *Bank of Augusta v. Earle* and *Paul v. Virginia*, as well as on the text of the Amendment, the circuit court rejected these arguments. As to citizenship, it reasoned:

Who are citizens of the United States, within the meaning of the 14th amendment, we think is clearly settled by the terms of the amendment itself. 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' No words could make it clearer that *citizens of the United States, within the meaning of this article, must be natural, and not artificial persons*; for a corporation cannot be said to be born, nor can it be naturalized. I am clear, therefore, that a corporate body is not a citizen of the United States as that term is used in the 14th amendment.

*Id.* at 68 (emphasis added). The court similarly rejected the insurer's claim of "personhood." It stated:

The word 'person' occurs three times in the first section, in the following connections: 'All persons born or naturalized in the United States' – 'nor shall any state deprive any person of life, liberty or property,' etc. – 'nor'

shall any state 'deny to any person within its jurisdiction the equal protection of the laws.' The complainants claim that this last clause applies to corporations – artificial persons. Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. *If we adopt the construction claimed by complainants, we must hold that the word 'person,' where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons. This construction of the section is strengthened by the history of the submission by congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal.*

*Id.* (emphasis added).

#### **4. This Court's Declaration of Corporate Personhood**

Constitutional corporate personhood is generally attributed to this Court's decision in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394

(1886). The county sued the railroad for failure to pay taxes, and the railroad presented the Court with six defenses, including the argument that the railroad is a "person" for the purposes of the Equal Protection Clause of the Fourteenth Amendment.

Justice Harlan, writing for the Court in *Santa Clara*, affirmed the decision for the railroad on non-constitutional grounds. His opinion stated:

If these positions are tenable, *there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below*; for, in that event, the judgment can be affirmed upon the ground that the assessment cannot properly be the basis of a judgment against the defendant.

118 U.S. at 411 (emphasis added). Nothing in Justice Harlan's opinion otherwise addressed the constitutional question.

In a companion case to *Santa Clara*, decided on the same day, Justice Field expressed regret that "the tax case from California" did not "decide the important constitutional question involved." *County of San Bernardino v. Southern Pac. R. Co.*, 118 U.S. 417, 422 (1886) (Field, J. concurring).

Thus, *Santa Clara* made no express holding on the weighty question of corporate "personhood" for purposes of the Fourteenth Amendment. It offered no reasoning and no assessment of Constitutional history. As Justice Rehnquist pointed out in *Bellotti*, the

*Santa Clara* holding involved "neither argument nor discussion." 435 U.S. at 822.

Justices Douglas and Black, dissenting in another case, observed:

The [*Santa Clara*] Court was cryptic in its decision. It was so sure of its ground that it wrote no opinion on the point, Chief Justice Waite announcing from the bench:

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

There was no history, logic, or reason given to support that view. Nor was the result so obvious that exposition was unnecessary.

*Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576-77 (1949) (Douglas, J., dissenting). See also *Conn. General Co. v. Johnson*, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting).

Despite this history, the Court began to cite *Santa Clara* as holding that corporations are "persons" under the Fourteenth Amendment. See, e.g., *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889); *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209-10 (1888); *Home Ins. Co. v. State of New York*, 119 U.S. 129, 133 (1886). The Court should be mindful of

the tenuous basis on which all this subsequent jurisprudence rests.

Corporate "personhood" has very dubious *stare decisis* value. At a minimum, the history of that principle under the Fourteenth Amendment militates for less expansive protection there than under the First Amendment.

### C. The Reasonableness of the Montana Law

The Montana Supreme Court compellingly showed that Montana's law is reasonable in the restrictions that it places on corporate speech. Compliance involves a minimal regulatory burden, by way of contrast to the onerous regulations struck down in *Citizens United*. See *Western Tradition Partnership*, ¶¶ 21, 46-47. The public interest served by the law is weighty and clearly articulated. See *id.*, ¶¶ 22-45; see also ¶¶ 122-30 (Nelson, J., dissenting).

This Court should hold that the Montana law is a reasonable regulation, permissible under the Fourteenth Amendment. A law review article which strongly supports that conclusion is Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 Iowa L. Rev. 995 (1998). The article argues, *inter alia*:

- Rather than a being a group of citizens, corporate shareholders are an abstraction. At least in the modern publicly traded corporation, the shareholders in

whose interests corporations must speak are *not* the human beings who own (or, more often, on whose behalf other institutions own) the shares. More often than not, shareholders are other corporations, who have interests quite different from those of real citizens in their full capacity as citizens. Unlike real people, the fictional shareholder is a one-sided abstraction that seeks to increase the value of its shares without regard for any other value, and that buys and sells shares according to market forces. *Id.* at 1003, 1042.

- The modern business corporation is a centralized entity whose shareholders are barred by state law from governing a corporation directly. A corporation's center of power rests with its board of directors, who have fiduciary duties to the corporation. Thus, corporate policies are determined by fiduciaries who are required to set aside their personal views, and to act solely in the interest of the corporation. *Id.* at 1007, 1033-34, 1045.
- As an inanimate entity, corporations must speak through human agents. The actual speakers – the lobbyists, the advertising writers, the lawyers, the executives, the publicists – do not speak on their own behalf. They are paid to speak for the corporation, and they have professional duties of loyalty to the corporation. That is why corporate speech is



never free, but rather is always compelled. *Id.* at 1038, 1045.

- Business corporations, by law, must disregard interests other than increasing shareholder value. Their political speech thus is geared to externalizing the cost of doing business. Unlike human beings, who have many interests to harmonize, corporations only have one interest. As a result, corporate speech improperly tends to skew the political process. *Id.* at 1054-55, 1062-70.

These points militate for a narrow protection of corporate political speech. The values supporting free speech protection for individuals do not apply. For that reason, Fourteenth Amendment corporate speech protection should be more narrowly framed than is First Amendment protection.

This Court should recognize the foregoing points to hold that States can reasonably regulate corporate political speech. A "reasonable regulation" standard under the Fourteenth Amendment should be established with reference to *Bellotti* (including the White and Rehnquist dissents) and to the dissent in *Citizens United*.

---

## CONCLUSION

With each passing day, corporations have a greater say in our lives – the food we eat, the products we

buy, the health care we receive, the news we see, the ideas we think, the economic rules we follow, the entertainment we enjoy, the education we acquire, the laws we enact, the work we do, the public officials we elect, the policies we have and the natural world we have left.

The influence of corporate wealth on elections is a matter of civic concern. The record compellingly shows that corporate cash perniciously can inundate the electorate in a small State. Montana's statute is a reasonable response to that threat to democracy.

This Court accordingly should deny the certiorari petition here and should allow the Montana statute to stand. In the alternative, it should grant the petition, affirm the Montana Supreme Court, and articulate the differences between First and Fourteenth Amendment corporate political speech. The Fourteenth Amendment allows States reasonably to regulate such speech, and Montana has met that standard here.

Respectfully submitted,

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May 2012

**AMICUS  
CURIAE  
BRIEF**

RECEIVED  
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BRIEFS

IN THE

**Supreme Court of the United States**

Supreme Court, U.S.  
FILED

MAY 18 2012

OFFICE OF THE CLERK

AMERICAN TRADITION PARTNERSHIP, INC., *et al.*,  
*Petitioners,*

*v.*

STEVE BULLOCK, ATTORNEY GENERAL  
OF MONTANA, *et al.*,  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MONTANA

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BRIEF FOR THE STATES OF NEW YORK, ARKANSAS,  
CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, IDAHO,  
ILLINOIS, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS,  
MINNESOTA, MISSISSIPPI, NEVADA, NEW MEXICO, NORTH  
CAROLINA, RHODE ISLAND, UTAH, VERMONT, WASHINGTON,  
WEST VIRGINIA, AND THE DISTRICT OF COLUMBIA, AS  
*AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## TABLE OF CONTENTS

	<i>Page</i>
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
BACKGROUND .....	5
ARGUMENT .....	10
THE COURT SHOULD DENY PETITIONERS' APPLICATION FOR SUMMARY REVERSAL .....	10
A. The Montana Law at Issue Here Does Not Operate as a Ban on Corporate Speech .....	12
B. The States Have Compelling Interests in Regulating Corporate Independent Expenditures in State and Local Elections That Were Not Addressed in <i>Citizens United</i> .....	16
CONCLUSION .....	23

## TABLE OF CITED AUTHORITIES

Page

## CASES

<i>American Tradition Partnership, Inc. v. Bullock</i> , 132 S. Ct. 1307 (2012) . . . . .	4
<i>Ashland Oil, Inc. v. Caryl</i> , 497 U.S. 916 (1990) . . .	10
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<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009) . . . . .	3, 17, 18, 20
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## Cited Authorities

	<i>Page</i>
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<i>Nixon v. Shrink Missouri Government PAC</i> , 528 U.S. 377 (2000) . . . . .	22
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	<i>Page</i>
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<i>Yamada v. Weaver</i> , No. 10-cv-497, -- F. Supp. 2d --, 2012 WL 983559 (D. Haw. Mar. 21, 2012) . . . . .	9
<b>CONSTITUTION, STATUTES &amp; REGULATIONS</b>	
<b>Federal</b>	
2 U.S.C. § 431 . . . . .	16
<b>State</b>	
<b>Alabama Code</b>	
§ 17-5-2 . . . . .	8
§ 17-5-5 . . . . .	8
<b>Alaska Stat.</b>	
§ 15.13.052 . . . . .	7
§ 15.13.135 (Jan. 2010) . . . . .	6
Alaska Sess. Laws, Ch. 36 (2010) . . . . .	6
Arizona Rev. Stat. § 16-914.02 . . . . .	7, 8
Arizona Sess. Laws, Ch. 4 (2010) . . . . .	6
<b>Colorado Rev. Stat.</b>	
§ 1-45-103 . . . . .	8
§ 1-45-107.5 . . . . .	7, 8

*Cited Authorities*

	<i>Page</i>
Colorado Sess. Laws, Ch. 269 (2010) . . . . .	6
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§ 21-5-3 . . . . .	8
§ 21-5-34 . . . . .	8
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§ 11-302 . . . . .	8
§ 11-321 . . . . .	8
Illinois Comp. Stat., ch. 10	
§ 5/9-3 . . . . .	8
§ 5/9-8.6 . . . . .	8
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Iowa Sess. Laws, Ch. 1119 (2010) . . . . .	6
Kansas Stat. § 25-4143(k) . . . . .	8
Kentucky Rev. Stat.	
§ 121.015 . . . . .	8
§ 121.035 (2010) . . . . .	6
§ 121.170 . . . . .	8
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§ 18:1483 . . . . .	8
§ 18:1505.2 (1980) . . . . .	7
Maine Rev. Stat., tit. 21-A	
§ 1052 . . . . .	8
§ 1053 . . . . .	8

*Cited Authorities*

	<i>Page</i>
Massachusetts Gen. Laws, ch. 55	
§ 1 .....	8
§ 5 .....	8
§ 8 (2010) .....	6
Maryland Election Law § 13-306 .....	7
Michigan Comp. Laws	
§ 169.203 .....	8
§ 169.224 .....	8
Minnesota Stat.	
§ 10A.12 .....	7
§ 10A.14 .....	8
§ 10A.20 .....	7
§ 211B.15 (Jan. 2010) .....	6
Minnesota Sess. Laws, Ch. 397 (2010) .....	6
Missouri Rev. Stat.	
§ 130.011 .....	8
§ 130.021 .....	8
§ 130.029 (1978) .....	7
Montana Const. art. VII, § 8 .....	16
Montana Code Ann.	
§ 7-4-2203 .....	16
§ 13-1-101 .....	8, 12, 15
§ 13-35-227 .....	3, 12, 16
§ 13-37-201 .....	8, 15
§ 13-37-210 .....	14
§ 69-1-103 .....	16
Montana Admin. R.	
§ 44.10.327 .....	12
§ 44.10.405 .....	15

*Cited Authorities*

	<i>Page</i>
Nebraska Rev. Stat.	
§ 49-1469.....	8
§ 49-1469.05 .....	8
§ 49-1469.07 .....	8
New Hampshire Rev. Stat.	
§ 664:2.....	8
§ 664:3.....	8
New Mexico Stat. § 1-19-26 .....	8
New York Election Law	
§ 14-100.....	8
§ 14-118.....	8
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Oregon Rev. Stat.	
§ 260.005.....	8
§ 260.044.....	8
South Dakota Codified Laws § 12-27-16.....	7
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§ 2-10-105 .....	8
§ 2-10-132 .....	8
Tennessee Sess. Laws, Public Act No. 1095 (2010) ..	7
Texas Sess. Laws, Ch. 1009 (2011) .....	7
Utah Code § 20A-11-101 .....	8
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§ 2801 .....	8
§ 2831 .....	8
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	<i>Page</i>
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INTEREST OF AMICI CURIAE<sup>1</sup>

To safeguard their democratic processes, the sovereign States have for over a century been enacting and enforcing laws regulating corporations' expenditures in state and local political campaigns. Although the States' laws governing corporate campaign expenditures vary in important respects, they all seek to ensure that such expenditures do not undermine principles of accountability and integrity in state and local elections, while protecting residents' rights to participate in the electoral process.

Petitioners' challenge to Montana's election laws asks this Court to address the permissible limits of state regulation of independent corporate expenditures in state and local candidate elections under the First Amendment. Any decision by this Court here will have consequences for state laws across the country. The amici States therefore have a strong interest in the outcome of this case, and a particularly strong interest in opposing petitioners' request that the Court summarily reverse the decision of Montana's Supreme Court, based on the Court's decision two years ago in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).<sup>2</sup>

This brief is submitted not only to oppose certiorari, but also—and principally—to urge this Court not to grant

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1. Amici States submit this brief pursuant to Supreme Court Rule 37.4. Counsel of record for all parties received timely notice of amici States' intent to file this brief.

2. Amicus the District of Columbia is not a State but has authority to enact laws governing its local elections. See D.C. Code § 1-203.02. The District of Columbia therefore also has a strong interest in the issues presented on this petition.

summary reversal on the basis of *Citizens United*. This case addresses state regulation of corporate spending in state and local elections, in contrast to *Citizens United*, which analyzed a federal statute governing only federal elections. To grant summary reversal in this case would deprive the States of the opportunity to be fully heard on the question of how to reconcile the free speech rights recognized in *Citizens United* with the special problems attendant on protecting the democratic character of state and local elections and institutions.

### SUMMARY OF ARGUMENT

The amici States agree with the State of Montana that the petition for certiorari should be denied. The decision of the Montana Supreme Court does not squarely conflict with the rulings of this Court, including *Citizens United*, or the decisions of other federal courts of appeals. Instead, this case presents the question of how the principles articulated in *Citizens United* apply in the quite different context of state and local elections. This Court should allow this novel question to percolate in the lower courts. Alternatively, if this Court grants review, summary reversal would be inappropriate because petitioners' challenge raises issues that were not presented in *Citizens United*. This amicus brief focuses on those issues.

Montana's law regulating corporate independent expenditures in state and local elections differs in several important respects from the federal law governing federal elections that the Court struck down in *Citizens United*. First, the Court found that the federal law at issue in *Citizens United* constituted a ban on corporate speech, but the same cannot fairly be said of the Montana law at issue here. *Citizens United* does not articulate a

clear standard for determining whether a law requiring a corporation that makes campaign expenditures to register as a political action committee, or PAC, constitutes a ban on speech. But under any reasonable standard, Montana has not banned corporations from speaking as to state and local elections. Montana simply requires a corporation to register a political committee and make independent expenditures from a segregated fund consisting of voluntary contributions from owners, members, or employees. See Mont. Code. Ann. (MCA) § 13-35-227(3). A political committee under Montana law is not a separate association from the corporation that registers it, and Montana provides streamlined procedures for the designation of political committees to permit corporations to speak timely and effectively in support of or in opposition to candidates for state and local office.

Second, as a state law applying to state and local elections, Montana's law regulating corporate campaign expenditures is supported by compelling government interests that were not present in *Citizens United*. The federal law struck down in *Citizens United* applied only to elections for President and Congress. By contrast, Montana's law applies to a wide range of state and local offices, including judgeships and law enforcement positions such as sheriff and county prosecutor. This Court has recognized that maintaining impartiality and the appearance of impartiality in judicial decisions is critically important, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and analogous interests apply to quasi-judicial and law enforcement offices. This Court should not summarily extend its reasoning in *Citizens United* to state laws that apply not only to high executive and legislative offices, but also to numerous judicial, quasi-judicial, and

law enforcement positions, where government interests in impartiality and freedom from outside influence are the strongest.

Moreover, the States, as compared with the federal government, face a much greater risk of domination of their elections by nonresident corporations. Recently, the Court summarily affirmed a district court decision upholding the federal law prohibiting independent expenditures by foreign nationals. *Bluman v. FEC*, 132 S. Ct. 1087 (Jan. 9, 2012) (Mem.), *aff'g*, 800 F. Supp. 2d 281 (D.D.C. 2011). States—particularly resource-rich States with small populations, like Montana—face the risk that nonresident corporations with discrete and well-defined interests will dominate campaign spending in state and local election contests. Laws regulating corporate campaign expenditures guard against and help prevent this outcome.

For all of these reasons, the Montana law at issue here, like many other state laws regulating corporate campaign expenditures in state and local elections, is sharply different from the federal law struck down in *Citizens United*, and the Court need not revise its ruling in *Citizens United* in order to sustain the challenged Montana law. In a thorough opinion applying *Citizens United*, the Montana Supreme Court correctly so held. There is no basis to summarily reverse that ruling.

While this case does not require the reconsideration of *Citizens United*, the amici States would support reconsideration of the matters addressed in *Citizens United*, whether in a future case or, if certiorari is granted here, in this case. See *American Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 1307 (2012) (statement

of Ginsburg, J.). In particular, the amici States believe that the Court should reexamine the assertion in *Citizens United* that independent expenditures, no matter their size or circumstances, rarely cause corruption or the appearance of corruption of federal officeholders, as well as the holding that the federal law at issue in that case could not be supported, in whole or in part, by government interests in preventing distortion of political campaigns and protecting shareholders from the use of corporate funds for political communications they do not support. But the Court need not revisit those issues here. The petition should be denied, or in the alternative, the Court should order full briefing and oral argument.

### BACKGROUND

The States have regulated corporate participation in politics for over a century. As corporations grew in size and economic importance near the end of the nineteenth century, control over corporate resources became concentrated in the hands of professional managers. The States recognized the economic benefits of separation of ownership and control, but also saw that it created the risk that managers would use shareholders' money to influence politicians for the managers' personal benefit or in other ways that the shareholders did not support.<sup>3</sup> Widespread legislative reform took hold after a 1905 scandal involving misuse of corporate funds by New York life insurance

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3. See Adam Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 Georgetown L. J. 871, 900-12 (2004); Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis Into First Amendment Jurisprudence*, 79 Wash. U. L.Q. 1, 36 (2001).



executives “shook the nation to its depths.”<sup>4</sup> By 1916, over two-thirds of the States had enacted prohibitions on corporate contributions to candidates.<sup>5</sup>

These laws persisted and evolved over the ensuing decades. At the time *Citizens United* was decided, twenty-four States regulated corporate independent expenditures to varying degrees. See 130 S. Ct. at 908-09. A few States barred all expenditures by for-profit corporations, while many others provided an option for such corporations to designate a political committee for the purpose of making independent expenditures.<sup>6</sup>

After *Citizens United*, twelve States relaxed their laws regulating corporate independent expenditures.<sup>7</sup>

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4. Winkler, *supra*, 92 Georgetown L. J. at 889 (quoting Upton Sinclair, *The Brass Check: A Study of American Journalism* 228 (1920)); see also *United States v. UAW-CIO*, 352 U.S. 567, 572-73 (1957).

5. See *United States v. U.S. Brewers' Ass'n*, 239 F. 163, 168 (W.D. Pa. 1916); Robert E. Mutch, *Before and After Bellotti: The Corporate Political Contribution Cases*, 5 Election L.J. 293, 298 (2006). In 1916, of course, this Court's distinction between contributions and independent expenditures did not yet exist, and neither did the means for influencing voters through broadcast television.

6. See **Alaska** Stat. § 15.13.135(a) (Jan. 2010); **Kentucky** Rev. Stat. § 121.035 (2010); **Massachusetts** Gen. Laws, Ch. 55, § 8 (2010); **Minnesota** Stat. § 211B.15(3) (Jan. 2010).

7. See **Alaska** Sess. Laws, Ch. 36 (2010) (S.B. 284); **Arizona** Sess. Laws, Ch. 4 (2010) (H.B. 2788); **Colorado** Sess. Laws, Ch. 269 (2010) (S.B. 10-203); **Connecticut** Sess. Laws, Public Act No. 10-187 (2010) (H.B. 5471); **Iowa** Sess. Laws, Ch. 1119 (2010) (S.F. 2354); **Minnesota** Sess. Laws, Ch. 397 (2010) (S.F. 2471); **North Carolina** Sess. Laws, Law 2010-170 (2010) (H.B. 748); **South**

The States' legislative responses, however, evidence their continuing interest in ensuring that corporate expenditures do not threaten the integrity of their democratic processes. For example, Iowa amended its laws to require a majority of the board of directors or comparable executive body to authorize independent expenditures. *See* Iowa Code § 68A.404(2) (2010); *see also* La. Rev. Stat. § 18:1505.2(F) (1980); Mo. Rev. Stat. § 130.029(1)(1) (1978). Wisconsin promulgated an emergency rule permitting corporations to make independent expenditures from a "designated depository account." Wis. Admin. Code, Emergency Rule GAB 1.91(3) (expired Feb. 2011); *see also* Wis. Gov't Accountability Bd., Guideline No. GAB-1284 (May 2012) (same); Alaska Stat. § 15.13.052(a) ("political activities account"); Colo. Rev. Stat. § 145107.5(7) ("separate account"). Minnesota amended its laws to allow corporations to make independent expenditures, subject to accounting and reporting requirements. Minn. Stat. §§ 10A.12(1a), 10A.20. And many States enacted additional disclosure laws to ensure that owners and members know when management is spending their money on politics, and that the public knows who stands behind the messages broadcast into their homes.<sup>8</sup>

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**Dakota** Sess. Laws, Ch. 76 (2010) (H.B. 1053); **Tennessee** Sess. Laws, Public Act No. 1095 (2010) (S.B. 3198); **Texas** Sess. Laws, Ch. 1009 (2011) (H.B. 2359); **West Virginia** Sess. Laws, Ch. 76 (2010) (H.B. 4647); **Wyoming** Sess. Laws, Ch. 74 (2011) (S.F. 3). In Kentucky, Massachusetts, Michigan, Ohio, Pennsylvania, and Wisconsin, an executive official or agency declared that some portion of the State's laws regulating corporate independent expenditures was unenforceable.

8. *See, e.g.,* **Arizona** Rev. Stat. § 16-914.02; **Connecticut** Gen. Stat. Ann. § 9-621(h); **Maryland** Elec. Law § 13-306; **South Dakota** Codified Laws § 12-27-16; **West Virginia** Code § 3-8-2.

Today, twelve States require every corporation to register as or designate a “political committee”<sup>9</sup> or to otherwise register<sup>10</sup> if it makes independent expenditures in excess of statutory threshold amounts to support or oppose the election of a particular candidate. Many more States require corporations to register as political committees if they accept contributions<sup>11</sup> or have a primary or major purpose to influence elections.<sup>12</sup>

In the barely two years since *Citizens United* was decided, opponents of campaign finance laws have commenced attacks on longstanding and newly enacted

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9. **Colorado** Rev. Stat. §§ 1-45-103(11.5), 145-107.5(3)(a); **Hawaii** Rev. Stat. §§ 11-302, 11-321(a); 10 **Illinois** Comp. Stat. §§ 5/9-3, 5/9-8.6(b); 21-A **Maine** Rev. Stat. §§ 1052(5)(A)(5), 1053; **Michigan** Comp. Laws §§ 169.203(4), 169.224; **Montana** Code Ann. §§ 131-101(22); 1337201; **New Hampshire** Rev. Stat. §§ 664:2(III), 664:3; **New York** Elec. Law §§ 14-100(1), 14-118.

10. **Arizona** Rev. Stat. § 16-914.02(A); **Minnesota** Stat. § 10A.14; **Tennessee** Code Ann. §§ 2-10-105(c)(1), 2-10-132; **Wisconsin** Stat. Ann. § 11.05; Gov’t Accountability Bd., Guideline No. GAB-1284 (May 2012).

11. See, e.g., **Alabama** Code §§ 17-5-2(11), 17-5-5(a); **Florida** Stat. § 106.011(1)(a), (b)(2); **Georgia** Code §§ 21-5-3(15), 21-5-34(e), (f); **Kentucky** Rev. Stat. §§ 121.015(3)(a), 121.170(1); **Massachusetts** Gen. Laws ch. 55, §§ 1, 5; **Missouri** Rev. Stat. §§ 130.011(9), 130.021(5); **Nebraska** Rev. Stat. §§ 49-1469(3), 49-1469.05(1), 49-1469.07; **Oregon** Rev. Stat. §§ 260.005(18), 260.044(3); **Vermont** Stat. Ann. tit. 17 §§ 2801(4), 2831.

12. See, e.g., **Kansas** Stat. § 25-4143(k); **Louisiana** Rev. Stat. § 18:1483(14)(a)(i); **New Jersey** Elec. Law Enforcement Comm’n, Advisory Op. No. 01-2011 (Apr. 27, 2011); **New Mexico** Stat. § 1-19-26(L); **Utah** Code § 20A-11-101(29)(c)(v); **Virginia** Code § 24.2-945.1.

state laws alike, arguing that “PAC-style” requirements are unconstitutional *per se*. Most courts have rejected this argument,<sup>13</sup> but some have accepted it.<sup>14</sup> As this divide shows, *Citizens United* leaves unanswered questions as to how, if at all, its interpretation of federal PAC rules might affect the States’ various PAC requirements.<sup>15</sup> Thus, after many decades of state regulation of corporate expenditures in state and local elections, this petition for certiorari arrives at a moment of intense and percolating litigation concerning the constitutionality of States’ PAC requirements. *Citizens United* does not resolve these challenges, and, in particular, does not resolve the challenge presented in this case.

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13. See *National Organization for Marriage v. McKee*, 649 F.3d 34, 56 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 314 n.4 (8th Cir. 2011), *reh’g en banc granted, opinion vacated*; *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1009 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011); *Iowa Right to Life Committee, Inc. v. Tooker*, 795 F. Supp. 2d 852, 865 (S.D. Iowa 2011) (appeal filed Mar. 8, 2012, Dkt. No. 12-1605). *Cf. also National Organization for Marriage, Inc. v. Walsh*, No. 10-CV-751A, 2010 WL 4174664 (W.D.N.Y. Oct. 25, 2010) (dismissing pre-enforcement challenge to definition of “political committee” for lack of jurisdiction) (appeal pending); *Vermont Right to Life Committee, Inc. v. Sorrell*, No. 2:09-cv-188 (D. Vt.) (pending challenge).

14. *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677-79 (10th Cir. 2010); see also *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008).

15. See *Yamada v. Weaver*, No. 10-cv-497, --F. Supp. 2d --, 2012 WL 983559, at \*20 (D. Haw. Mar. 21, 2012); *South Carolina Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 720 (D.S.C. 2010).

## ARGUMENT

## THE COURT SHOULD DENY PETITIONERS' APPLICATION FOR SUMMARY REVERSAL

This Court rarely reverses the judgment of a State's highest court on summary review, and almost never does so to invalidate a duly enacted state statute. Nearly all of the summary reversals of state courts have corrected a court's clearly erroneous application of constitutional rules of criminal procedure,<sup>16</sup> and have not struck down a statute enacted by the State's legislature or by the State's citizens through ballot initiative.

This Court has summarily reversed to strike down a state statute only in truly exceptional circumstances, such as where the state court, in upholding the statute, openly disagreed with a prior ruling of this Court,<sup>17</sup> or where this Court had already invalidated the same statute or a virtually identical statute of another State.<sup>18</sup>

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16. See, e.g., *Sears v. Upton*, 130 S. Ct. 3259 (2010) (per curiam) (effective assistance of counsel); *Presley v. Georgia*, 130 S. Ct. 721 (2010) (per curiam) (Sixth Amendment right to public trial); *Michigan v. Fisher*, 130 S. Ct. 546 (2009) (per curiam) (Fourth Amendment suppression order); see also the majority of cases cited at Pet. 33.

17. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam).

18. See *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149 (1993) (per curiam); *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916 (1990) (per curiam); *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975) (per curiam). But cf. *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam); *Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (per curiam).



Neither circumstance is present here. First, the Montana Supreme Court carefully applied *Citizens United*; it did not disregard or express disagreement with that decision. Second, this Court has not yet addressed the question presented by this petition—namely, the effect of *Citizens United* on the validity of a *state* statute regulating corporate independent expenditures in state and local candidate elections.

Petitioners here ask the Court to strike down Montana's law on summary review, based on a comparison to a quite different *federal* law. Petitioners and their amici cite no case in which this Court has summarily invalidated a state statute based on a prior decision involving an allegedly analogous federal statute. The Court does not reverse summarily under these circumstances for good reason. The Constitution grants enumerated powers to the federal government and reserves the remainder to the States, and as a result, the States can and do enact legislation based on authority and interests that are distinct from those possessed by the federal government. And the States' interests are at their greatest as to the regulation of their own democratic processes of self-government.

For all of these reasons, even if the challenged Montana law were identical to the federal statute struck down in *Citizens United*—and, as shown below, it is far from identical—disposing of this case on the merits would require a fully considered analysis that takes these constitutional distinctions into account. And because petitioners' proffered authority does not address several critical issues arising under the State's law, summary reversal would be especially inappropriate here.



**A. The Montana Law at Issue Here Does Not Operate as a Ban on Corporate Speech.**

The decision in *Citizens United* rested on the Court's conclusion, at the outset of its analysis, that the federal statute at issue operated as a ban on corporate speech.<sup>19</sup> The Court held that a federal statute authorizing a corporation to form and administer a federal PAC for the purpose of making independent campaign expenditures did not permit the corporation itself to speak. *See* 130 S. Ct. at 897 (citing 2 U.S.C. § 441b(b)(2)). The Court reasoned that (1) a federal "PAC is a separate association from the corporation," and (2) even if it were not, federal PACs are "burdensome" and "expensive," given the extensive body of federal statutes and regulations that apply to them. *Id.* The Court further emphasized that a corporation had to run the administrative gauntlet required to form a federal PAC before the PAC could speak. *Id.* at 898.

But none of these things is true as to Montana's laws permitting the designation of "political committees" and allowing corporations to make independent expenditures from a "segregated fund." *See* MCA §§ 13-1-101(22), 13-35-227(3); *see also* Mont. Admin. R. § 44.10.327 (types of committees). First, in Montana, political committees are not separate associations or entities from the corporations that register them. Second, Montana's rules governing the registration of political committees are far less burdensome than the federal regulations governing

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19. Like the plaintiff in *Citizens United*, petitioners in this case do not challenge any limit on corporate contributions or coordinated expenditures that a corporation makes in concert with or at the request of any political candidate or party. *See* 130 S. Ct. at 909.

federal PACs. Consequently, there is no foundation for petitioners' repeated characterizations (e.g., Pet. at 10-11) of the Montana law as a ban on corporate speech comparable to the federal law addressed in *Citizens United*.

*Citizens United* did not describe a test for determining whether a "political committee" or "segregated fund" is separate and distinct from the corporation that sponsors and administers it. The Court did cite Justice Kennedy's dissenting opinion in *McConnell* on this point; however, see 130 S. Ct. at 897-98 (citing *McConnell v. FEC*, 540 U.S. 93, 330-33 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part)), and that opinion provides some guidance in this area. Justice Kennedy's opinion in *McConnell* suggests that an appropriate test for determining whether a corporation is able to speak through its PAC would consider (1) the degree of control that the corporation has over the PAC, (2) whether the statute permits attribution of political communications to the corporation, and (3) whether the PAC is a distinct legal entity. See *McConnell*, 540 U.S. at 330-33. If the corporation controls the content of the communication and is identified as the speaker, the corporation is undoubtedly making a statement, regardless of whether the PAC is a distinct legal entity, and regardless of who pays for the statement. Cf. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (holding that, under securities laws, "the maker of a statement is the person or entity with ultimate authority over the statement"). And if the PAC or segregated fund is *not* a distinct legal entity, but instead merely a label or designation for regulating certain corporate activities, the conclusion that the corporation is speaking follows

only more strongly. *See McKee*, 649 F.3d at 56; *Swanson*, 640 F.3d at 313.

Montana's laws concerning "political committees" meet these tests. First, the corporation controls a political committee that it registers under Montana law because the committee's decision-making authority is vested in an employee or employees of the corporation.

Second, the corporation may identify itself as the speaker in political communications, so long as the communications comply with other applicable disclosure requirements. *See MCA* § 13-37-210; Affidavit of Mary Baker, Sept. 10, 2010 ("Baker Aff."), ¶ 10 ("[T]here is nothing in Montana's campaign finance laws that would prohibit a political committee led by Mr. Champion from using his corporation's name to support or oppose political candidates, parties, or ballot measures."). A Montana corporation may broadcast a message stating that "ABC Corp. endorses Mr. X for Governor"—although in practice many corporations elect not to identify themselves as the speaker in this way, and others avoid direct association with a message by contributing to another group that makes independent expenditures, such as petitioner American Tradition Partnership. *Cf. Citizens United*, 130 S. Ct. at 914 (noting evidence in *McConnell* record "that independent groups were running election-related advertisements while hiding behind dubious and misleading names" (quotation marks omitted)).

Third, Montana law does not require that a political committee or its segregated fund be incorporated or have any separate legal existence. Montana law defines a political committee as a "combination of two or more

individuals or a person" that makes a contribution or expenditure to support or oppose a candidate, MCA § 13-1-101(22) (emphasis added), and further defines "person" to include a corporation, MCA § 13-1-101(20). This statutory scheme therefore enables a corporation to register *itself* as a political committee. For all these reasons, there is no basis to conclude that a political committee in Montana is a "separate association" from the corporation that registers and controls it. *Cf. Janus*, 131 S. Ct. at 2304 (investment manager not liable for statements made by mutual fund, which was "legally separate entit[y]" with independent board).

Nor are political committees in Montana "burdensome" and "expensive," as the Court found to be true of federal PACs organized and administered under the extensive regulatory regime of the FEC. Petitioners do not meaningfully dispute that administering a political committee under Montana law is far less burdensome and costly than administering a PAC under the federal regime considered in *Citizens United*. A political committee may register with the Montana Commissioner of Political Practices by completing a short form requesting basic information such as the committee's name and address, the name and address of the committee treasurer, whether the committee is incorporated, and the name of the candidate, party, or ballot issue that the committee supports or opposes. *See Baker Aff.* ¶ 3; Mont. Admin. R. § 44.10.405. And the corporation need not register as a PAC until *after* making a contribution or expenditure, *see* MCA § 13-37-201 (within five days), resolving the Court's objection in *Citizens United* that federal PACs "must exist before they can speak," 130 S. Ct. at 898. These reporting requirements are *de minimis*.

Montana's law does require corporations to make campaign expenditures from a segregated fund consisting of voluntary contributions from individuals associated with the corporation. MCA § 13-35-227(3). But, for the reasons outlined above, the Montana statute does not ban corporate speech. The Court's holding in *Citizens United* was premised on the conclusion that the federal law at issue there banned corporate speech. *Citizens United* should not be summarily expanded to cover the quite different Montana law involved here.

**B. The States Have Compelling Interests in Regulating Corporate Independent Expenditures in State and Local Elections That Were Not Addressed in *Citizens United*.**

1. Montana's law, like most if not all *state* campaign finance laws, covers elections for a range of state and local offices—including judicial, quasi-judicial, and law enforcement positions—that have no analogue in federal elections. The federal law addressed in *Citizens United* applied to elections for President, Vice President, Senator, and Representative, *see* 2 U.S.C. § 431(3), and the Court's analysis was accordingly rooted in norms specific to “representative politics,” 130 S. Ct. at 910 (quotation marks omitted). But Montana's law applies not just to analogous state gubernatorial and legislative elections, but also to elections for judge, county attorney, sheriff, and public service commissioner, among many other offices.<sup>20</sup>

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20. Mont. Const. art. VII, § 8 (judges); MCA § 69-1-103 (public service commissioners); *id.* § 7-4-2203 (county attorney, clerk of the district court, county clerk, sheriff, treasurer, county superintendent of schools, county surveyor, assessor, coroner, public administrator, and justice of the peace).



*Citizens United* had no reason to consider, and did not consider, the States' interests in regulating elections for offices like these.

In striking down the federal statute restricting corporate expenditures in campaigns for presidential and congressional office, *Citizens United* stated that "quid pro quo" corruption is the only form of influence over federal elected officials that the government has a compelling interest in preventing, and concluded that the interest failed to support the statute at issue in that case. See 130 S. Ct. at 908-11. The Court rejected the notion that the federal statute could be sustained as a regulation of corporations' "influence over or access to elected officials," on the ground that influence, ingratiation, and access are unavoidable in "representative politics." *Id.* at 910 (quotation marks omitted).

But any such norms accepting influence and access in "representative politics" do not necessarily apply to judicial, quasi-judicial, and law enforcement officials. The force of this point is clearest as to judicial office. Judges are not "representatives" with offices open to the public, and outside influence by major campaign spenders is not recognized as a legitimate factor in judicial decision-making. The Court confronted a variation on the point in *Caperton v. A.T. Massey Coal Co.*, where it held, as a matter of constitutional due process, that a businessman's independent expenditures supporting a candidate in a judicial campaign created an "objective risk of actual bias" sufficient to require recusal of the candidate as judge in litigation involving the business. 556 U.S. at 886. To be sure, as the Court observed in *Citizens United*, 130 S. Ct. at 910, the decision in *Caperton* held only that due



process principles required the judge's recusal in the case in question, and did not consider the permissibility of any state law restricting campaign expenditures in judicial elections. But *Caperton* nonetheless demonstrates that norms against influence and the appearance of influence in judicial decision-making, not limited to quid pro quo corruption, are so important as to be constitutionally enshrined.

Rules governing recusal may not suffice to prevent improper influence in judicial, quasi-judicial, and law enforcement matters for several reasons, including the fact that such influence is often not confined to a specific case in which a speaker is a party or otherwise directly interested. This Court has not yet addressed whether a State's interest in preventing improper influence and the appearance of such influence over judicial, quasi-judicial, and law enforcement officials may support a state law regulating campaign expenditures, particularly when, as in this case, the law does not ban anyone from speaking.<sup>21</sup>

2. State campaign finance laws like Montana's also implicate the government's interest in regulating campaign expenditures by nonresidents to a vastly greater degree than the federal law this Court considered

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21. Petitioners are incorrect in arguing (Pet. at 19 n.4) that the Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), forecloses any argument that elections for judicial, quasi-judicial, or law enforcement offices implicate broader governmental interests than are presented by elections solely for representative offices. To the contrary, *White* expressly disavowed any suggestion that the First Amendment permits no distinctions between "campaigns for judicial office" and "campaigns for legislative office." *Id.* at 783.

in *Citizens United*. For instance, petitioner American Tradition Partnership, a Colorado corporation, is a foreign corporation as to Montana. The States have a compelling interest in preventing domination of state and local elections by nonresident corporate interests. See, e.g., *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 617 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000).

In *Citizens United*, the Court expressly reserved the question of the constitutionality of a federal law prohibiting independent campaign expenditures (as well as campaign contributions) by foreign nationals. See 130 S. Ct. at 911. Last year, a three-judge federal district court upheld the federal ban on independent expenditures by foreign nationals, *Bluman v. FEC*, 800 F. Supp. 2d 281, and, earlier this year, the Court summarily affirmed that ruling, 132 S. Ct. 1087. The district court held in *Bluman* that “the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government.” 800 F. Supp. 2d at 288. The court further concluded that this interest supported the federal prohibition on expenditures by foreign nationals to influence U.S. elections. *Id.* at 289. As the court observed, foreign nationals “stand in a different relationship” to our political community than do domestic corporations or residents. *Id.* at 290.

*Bluman* therefore further demonstrates that—contrary to petitioners’ claims (see Pet. at 32-33)—the anti-corruption interest is not the only cognizable government interest that can support restrictions on campaign expenditures: a polity also has a compelling interest in regulating electoral influence by nonresidents.

The States are sovereign and self-governing, *see, e.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 438-41 & n.7 (1982), and have a strong interest in limiting participation in their political processes to those who reside within their borders, *see Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68-69 (1978).

As noted above, state campaign finance laws present the interest in regulating nonresidents' electoral influence in significantly stronger form than do federal laws, because a much larger proportion of potential corporate spenders are nonresidents of a particular State than they are nonresidents of the entire United States. *See* U.S. Census Bureau, Statistics of U.S. Businesses: 2008, All Industries – By State, *available at* <http://www.census.gov/epcd/susb/latest/us/US--.htm> (last visited May 14, 2012) (reporting that in 2008, only 32,570 out of nearly six million U.S. firms with payroll provided a Montana address). And nonresident *corporations*, due to their large aggregations of wealth and discrete economic interests, present the greatest risk of domination or distortion of state and local elections by nonresidents. The fact that spending levels and numbers of contributors are greatly lower in state and local elections, as compared with federal elections, heightens the susceptibility of state and local elections to domination by nonresident corporations. In 2008, for example, candidates for the Montana House of Representatives and Senate raised an average of about \$8,000 and \$13,000, respectively, whereas federal House and Senate candidates nationwide raised, on average, about *two hundred* times as much money.<sup>22</sup> And

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22. *See* Affidavit of Edwin Bender, Sept. 10, 2010, ¶ 17 (state averages); Center for Responsive Politics, Price of Admission, <http://www.opensecrets.org/bigpicture/stats.php?cycle=2008&type=M&display=A> (last visited May 15, 2012).

independent expenditures in Montana also appear to be quite low in comparison with independent expenditures in federal campaigns.<sup>23</sup>

Recent history furnishes several instances in which nonresidents have dominated spending in state elections. In 2010, spending by out-of-state groups far exceeded local spending on communications for and against retention of three Iowa Supreme Court Justices. Foreign spending was heavily one-sided, with the vast majority of out-of-state funds spent in opposition to the Justices. Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 Ct. Rev. 118, 120-21 (2011); Ian Bartrum, *Constitutional Rights and Judicial Independence: Lessons from Iowa*, 88 Wash. U. L. Rev. 1047, 1048 (2011). And because of independent expenditures made by foreign corporations, overall spending on the retention elections was also heavily one-sided. *See id.* All three Iowa Justices lost their seats. And in Wisconsin, spending on recall elections for Governor Scott Walker and certain state senators has already exceeded previous records based in large part on out-of-state spending. *See, e.g.,* Jason Stein, *Recall Cost to Government: \$2.1 million; Amount Spent: A Record \$44 million*, Milwaukee Journal Sentinel (Sept. 20, 2011). *See also* Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect a Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. Rev. 35, 46 (2010) (estimating that fifty to eighty percent of spending on abortion referendum came from out of state); Christopher R. Nolen, *Election Law*, 41 U. Rich. L. Rev.

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23. *See* Affidavit of Mike Cooney, Sept. 9, 2010, ¶¶ 9-18; Affidavit of Bob Brown, Sept. 9, 2010, ¶¶ 12-25.

121, 139 (2006) (reporting that out-of-state organization contributed \$2.1 million to candidate for attorney general, prompting reforms). 7

Before *Bluman*, courts had reached different conclusions as to the constitutionality of state statutes restricting nonresidents' spending in state campaigns. The Supreme Court of Alaska upheld a statute restricting contributions by nonresidents in state elections, see *Alaska Civil Liberties Union*, 978 P.2d at 614-17, whereas the Second Circuit invalidated a similar Vermont statute, see *Landell v. Sorrell*, 382 F.3d 91, 146-48 (2d Cir. 2004), *rev'd on other grounds*, 548 U.S. 230 (2006). In *VanNatta v. Keisting*, the Ninth Circuit, over a strong dissent, struck down an Oregon ballot measure that prohibited candidates for state office from using contributions from outside their electoral district. 151 F.3d 1215 (9th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999).<sup>24</sup> But see *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1091 n.2 (9th Cir. 2003) (stating that *VanNatta* has been superseded by *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), which sustained Missouri's contribution limits based on evidentiary record compiled by the State). Of course, this Court's decision in *Bluman*, summarily affirming the lower court's ruling upholding the federal prohibition on independent expenditures by foreign nationals, strongly suggests that States may permissibly restrict campaign expenditures by nonresidents, including

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24. The state laws addressed in these cases, unlike the federal law upheld in *Bluman*, restricted nonresidents as to contributions and not expenditures. As the district court noted in *Bluman*, however, the differences between contributions and expenditures are not relevant to the validity of campaign finance restrictions on foreign entities. See 800 F. Supp. 2d at 288 n.3.



nonresident corporations. The fact that the Court did not address the question of nonresident expenditures in *Citizens United* is another reason that summary reversal would be inappropriate in this case.

### CONCLUSION

The petition for certiorari should be denied. In the alternative, the Court should grant certiorari and order full briefing and oral argument.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**

No. 11-1179

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IN THE  
**Supreme Court of the United States**

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AMERICAN TRADITION PARTNERSHIP, INC., F.K.A.  
WESTERN TRADITION PARTNERSHIP, INC., ET AL.,

*Petitioners,*

v.

STEVE BULLOCK, ATTORNEY GENERAL OF MONTANA,  
ET AL.,

*Respondents.*

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On Petition For A Writ Of Certiorari  
To The Supreme Court of Montana

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**BRIEF OF UNITED STATES SENATORS SHELDON  
WHITEHOUSE AND JOHN MCCAIN AS *AMICI  
CURIAE* IN SUPPORT OF RESPONDENTS**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	3
I. THE MONTANA SUPREME COURT APPLIED THE CORRECT LEGAL STANDARD TO THE FACTUAL RECORD BEFORE IT.....	3
II. THE COURT SHOULD IN ALL EVENTS DECLINE PETITIONERS' INVITATION TO SUMMARILY REVERSE.....	5
A. Political Spending After <i>Citizens United</i> Demonstrates that Coordination and Disclosure Rules Do Not Impose a Meaningful Check on the System.....	8
B. Unlimited, Coordinated and Undisclosed Spending Creates a Strong Potential for <i>Quid Pro Quo</i> Corruption. ....	17
C. The Appearance of Corruption Created by Independent Expenditures is Strong.....	20
CONCLUSION .....	22



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### Page(s)

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## STATEMENT OF INTEREST<sup>1</sup>

*Amici* are U.S. Senator Sheldon Whitehouse of Rhode Island and U.S. Senator John McCain of Arizona.

*Amici* file this brief for two reasons. First, as active, democratically elected legislators, they have a direct understanding of the effects of unlimited independent election expenditures on our legislative system and our democracy. *Amici's* observations about both the risk and the appearance of corruption created by unlimited independent expenditures will assist the Court as it decides to consider "whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway," 132 S. Ct. 1307 (2012) (statement of Justices Ginsburg and Breyer).

Second, as national political leaders, *amici* have a strong interest in the proper functioning of our democracy. In their view, the appearance of corruption undermines trust and participation in our elections, the opportunity for corruption makes the legislative process more difficult, and both diminish the standing of our democracy in the eyes of the world. Accordingly, *amici* respectfully ask the Court to confirm that Congress and state legislators may, upon an appropriate record demonstrating the potential for corruption or perceived corruption created by independent expenditures, enact legislation in response to that real and significant threat.

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<sup>1</sup> Pursuant to Rule 37.6, counsel certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties.



## SUMMARY OF ARGUMENT

This case concerns an issue of paramount importance to our nation: the effective functioning of American democracy. America's democracy has long stood as a model to the world. The costs of disrupting a fair and effective American democracy are high – to our states, our nation, and our world.

1. The Montana court reviewed extensive record evidence of corruption, evidence of the type this Court deemed a “cause for concern” in *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010). *Citizens United* held that when a legislature “finds that a problem exists” – when it makes a legislative finding based on evidence that “elected officials succumb to improper influences from independent expenditures” – judges “must give that finding due deference” and “must give weight” to laws that “seek to dispel the appearance or reality of these influences.” *Id.* That is what the Montana Supreme Court did in this case, which is reason enough to deny the petition. Sup. Ct. R. 10. Petitioners’ inevitable disagreement with the ruling against them does not justify the exercise of certiorari here.

2. If the Court does grant the writ, however, summary reversal is not the appropriate disposition of the case. Full briefing and argument, and a decision in the ordinary course, would allow the Court to confirm lawmakers’ continuing authority to respond when the evidence shows “that a problem exists.” *Citizens United*, 130 S. Ct. at 911.

And a problem does exist. Evidence from the 2010 and 2012 electoral cycles has demonstrated that so-called independent expenditures create a strong potential for corruption and the perception thereof. The news confirms, daily, that existing campaign finance rules purporting to provide for “independence” and “disclosure” in fact provide neither. Regulatory

filings show that much of the funding for independent expenditures comes from shell companies, pass-through entities, and non-profit organizations that conceal the true source of the individuals and companies supporting them. These non-disclosed funding sources were not what the Court had in mind when it issued its ruling in *Citizens United*, and therefore it did not consider the strong potential for corruption and the appearance of corruption they would create, including through threats and promises of spending.

In light of these developments, if the Court grants the petition, it should revisit *Citizens United*'s finding that vast independent expenditures do not give rise to corruption or the appearance of corruption. The Court should clarify that when legislatures build an appropriate record demonstrating the potential for corruption or the appearance thereof created by independent expenditures, they may enact appropriate preventative legislation in response.

### ARGUMENT

#### I. THE MONTANA SUPREME COURT APPLIED THE CORRECT LEGAL STANDARD TO THE FACTUAL RECORD BEFORE IT.

The Court in *Citizens United* explained its holding as an application of the basic principle that when an elected legislature "finds that a problem exists," it may not choose a remedy that is "asymmetrical" to the risk. 130 S. Ct. at 911. The Court anticipated that if Congress found that "a problem exists" as the result of independent expenditures, the Court would "give that finding due deference" and "give weight" to any legislative remedy. *Id.* These statements are inconsistent with Petitioners' *per se* rule prohibiting laws like the Montana Corrupt Practices Act.

The Montana Supreme Court did just as this Court instructed. First, it determined that the State had a "compelling interest" justifying the law based on the extensive evidence in the trial record (a record this Court did not enjoy in *Citizens United*). See Pet. App. 17a-29a. It noted the historical evidence of actual corruption, including vote-buying in the legislature, *id.* at ¶¶ 24-26, 36; gubernatorial misconduct, *id.* at ¶ 24; and judicial bias and bribery, *id.* at ¶¶ 23, 36, noting a particular danger in Montana, where advertising is cheap. *Id.* at ¶¶ 29-32, 38. It cited concerns about the independence of the State's judiciary. *Id.* at ¶¶ 42-45. The court also found substantial evidence that Montana voters believe that corporate independent expenditures lead to corruption, and that this belief has contributed to widespread cynicism and low voter turnout. See *id.* at ¶¶ 28, 33, 38.

Then, the Montana Supreme Court assessed whether the State's prohibition of corporate expenditures was "narrowly tailored" to the problem identified in the record. See Pet. App. 31a-32a. Looking specifically at the characteristics of Petitioners' corporate entities, the Court concluded that the law, *as it applied to them*, had no more than a "minimal impact," if any. *Id.*

This Court has "rarely granted" a petition for certiorari "when the asserted error consists of \* \* \* the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Montana Supreme Court faithfully applied the law to the factual record before it. No further justification should be needed to deny the petition.

## II. THE COURT SHOULD IN ALL EVENTS DECLINE PETITIONERS' INVITATION TO SUMMARILY REVERSE.

If this Court concludes that review of the Montana court's decision is nevertheless warranted, a full hearing is necessary. Summary reversal is plainly not the appropriate course, whatever this Court concludes about the petition's merits. *Cf. Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting) ("In vacating the judgment of a state court for no better reason than our own convenience, we not only fail to observe, but positively flout the special deference owed \* \* \* to state courts") (internal quotation marks omitted).

The linchpin of the Petition concerns this Court's statement in *Citizens United* that vast corporate independent expenditures "do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909. Petitioners repeatedly refer to that statement from *Citizens United* as a "holding" and "a matter of law." Application to Stay Decision at 19; *see* Pet. at 15, 16.

That cannot be so. Whether independent expenditures pose dangers of corruption or apparent corruption depends on the actual workings of the electoral system; it is a factual question, not a legal syllogism. In a passage from *Buckley v. Valeo* discussed in *Citizens United*, this Court stated that "the independent advocacy restricted by the provision does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. 1, 46 (1976) (emphasis added). The *Buckley* Court's use of the phrase "presently appear" reflects that the risk of corruption is in reality a factual determination to be made about the functioning of the electoral system at a particular time.



The peculiar posture of *Citizens United* deprived the Court of a factual record (in contrast to previous decisions of this Court, such as *McConnell v. FEC*, 540 U.S. 93 (2003), which relied heavily on exhaustive records developed by Congress and in the litigation).<sup>2</sup> The Court acknowledged that “[w]hen Congress finds that a problem exists, we must give that finding due deference” and “give weight to attempts by Congress to seek to dispel either the appearance or reality of these influences.” *Citizens United*, 130 S. Ct. at 911.

Evidence from the 2010 and 2012 election cycles confirms that “a problem exists” – new political expenditures have opened the door to *quid pro quo* corruption and the appearance thereof. Massive new spending, most of it on negative attack ads that are proven to change voting patterns,<sup>3</sup> has been closely coordinated with campaigns, and much of it has been undisclosed. As a result, outside groups can now spend – or credibly threaten to spend – overwhelming amounts of money in support of or against a candidate, without a publicly disclosed paper trail. If spent on negative attack ads, the substance of the ads may not even yield a clue to the interest of the attackers, let alone their identities.

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<sup>2</sup> The Supreme Court (and appellate tribunals generally) have traditionally limited themselves to reviewing factual findings made by a lower court, and have not made factual determinations themselves.

<sup>3</sup> See n.35, *infra*; Drew Westen, *Why Attack Ads? Because They Work*, L.A. Times, Feb. 19, 2012 (“A well-crafted positive ad can ‘stick’ too, but there’s nothing like a sinister portrayal of a greedy, self-centered villain, replete with grainy images and menacing music, to stir up our unconscious minds.”); see also Morgan Little, *Negative Ads Increase Dramatically During 2012 Presidential Election*, L.A. Times, May 3, 2012 (seventy percent of political ads aired in the 2012 election cycle have been negative – up from only nine percent in 2008).

The ability to make and to credibly threaten large expenditures gives outside groups the opportunity to exert improper leverage over politicians running for office. Through backchannel communications, or simply a quiet phone call, candidates can be warned, for example, that failure to take the "right" position will be punished with a large expenditure against them.<sup>4</sup> "Killing an admiral" from time to time might be enough.<sup>5</sup> Alternatively, interest groups can gain improper influence by promising to support a political candidate with a large expenditure if the need arises. Before *Citizens United*, a threat of attack or pledge of support would mean a maximum \$5,000 PAC contribution, or perhaps hosting a fundraiser for a legislator, with all contributions disclosed. Today, this could mean an unlimited independent expenditure, including an anonymous one, that could elect or defeat a candidate.

If the threat is successful or if the pledge of support turns out to be unnecessary, there will be no record of the *quid pro quo*: no public advertising, no disclosure, no trail of receipts, and no account statements for regulators, prosecutors and media outlets to track. The lack of disclosure thus makes ferreting

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<sup>4</sup> See *This American Life: Take the Money and Run for Office*, No. 461 (WBEZ radio broadcast Mar. 30, 2012) (transcript available at <http://www.thisamericanlife.org/radio-archives/episode/461/transcript>) (Norman Ornstein: "I've had this tale told to me by a number of lawmakers. You're sitting in your office and a lobbyist comes in and says, 'I'm working with Americans for a Better America. And I can't tell you who's funding them, but I can tell you they really, really want this amendment in the bill.' And who knows what they'll do? They've got more money than God.").

<sup>5</sup> See Voltaire, *Candide*, ch.23 (1759) ("In this country, it is good to kill an admiral from time to time, in order to encourage the others.").



out this *quid pro quo* corruption extremely difficult. Plenary review would afford the Court an opportunity to consider the implications of this phenomenon for its finding that independent expenditures do not corrupt.

**A. Political Spending After *Citizens United* Demonstrates that Coordination and Disclosure Rules Do Not Impose a Meaningful Check on the System.**

A premise of *Citizens United* was its finding that independent expenditures do not create a risk of corruption or the appearance of corruption. That premise rested on two critical assumptions: (i) that anti-coordination rules “substantially diminish[ ]” the “potential for abuse” of independent expenditures, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47); and (ii) that the Bipartisan Campaign Reform Act created a regime of “effective disclosure” that would “provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.” *Id.* at 916.

Political spending in the 2010 and 2012 election cycles has undermined both of these core assumptions.

**1. Coordination Rules are Ineffective.<sup>6</sup>**

In *Citizens United*, the Court assumed a strong and well-enforced prohibition on coordination between campaigns and “independent” advocates. As

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<sup>6</sup> See Fredreka Schouten, *Super PAC Limits Blur Ahead of Nov. 6*, USA Today, Mar. 1, 2012; Marian Wang, *Uncoordinated Coordination: Six Reasons Limits on Super PACs Are Barely Limits at All*, ProPublica, Nov. 21, 2011, <http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all>.

the Court saw it, "[t]he separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) (citing *Citizens United*, 130 S. Ct. at 908).

The Court did not anticipate how coordination rules operate – or fail to operate – with respect to the new breed of "independent expenditure-only committees," commonly known as super PACs. In effect the "separation between candidates and independent expenditure groups" that was an essential predicate to the *Citizens United* decision has been eliminated. Evidence from the current election cycle bears this out:

*Candidate-Specific Super PACs.* The ongoing presidential and congressional races are now heavily driven by a handful of super PACs, each founded and managed for the benefit of a single candidate.<sup>7</sup> Wealthy donors who have maxed out their contributions to the candidate are now using these candidate-specific super PACs as convenient proxies to make the functional equivalent of campaign contributions.<sup>8</sup>

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<sup>7</sup> Russ Choma, *Super PAC Spending Teeters at \$100 Million Mark*, Center for Responsive Politics Open Secrets Blog, May 10, 2012, <http://www.opensecrets.org/news/2012/05/super-pac-spending-teeters-at-100-million-mark.html> ("The hard-fought Republican primary, which dragged out longer than many expected, attracted the bulk of the super PAC money. The five top outside spenders, all of them super PACs formed to support one of the GOP candidates, account for \$86 million of this first \$100 million spent.").

<sup>8</sup> See Schouten, *supra* n.6 (prominent campaign supporter was also single-largest donor to candidate's super PAC); Dave

*Closely Connected Staff and Consultants.* Many prominent candidate-specific super PACs are run by former high-level aides to the candidate,<sup>9</sup> and nothing prevents those affiliated with a super PAC from later taking a job with the candidate's campaign.<sup>10</sup> It is probably not a coincidence, then, that super PACs and the candidates they support also often use the same outside consultants and advisers.<sup>11</sup>

*Coordinated Fundraising and Advertising.* Campaign committees and super PACs openly coordinate on fundraising. Candidates appear at super PAC fundraising events and share their fundraising lists.<sup>12</sup> Super PACs are permitted to run ads that

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Levinthal, *2011 Sees Super PAC Explosion*, Politico, Oct. 6, 2011, <http://www.politico.com/news/stories/1011/65310.html>.

<sup>9</sup> For example, the President's super PAC, Priorities USA Action, is run by his former deputy press secretary, and Mitt Romney's super PAC was founded by his 2008 campaign general counsel. See Wang, *supra* n.6; see also Letter to IRS from Campaign Legal Center, Sept. 28, 2011, at 4, 9, [http://www.campaignlegalcenter.org/attachments/Letter\\_to\\_the\\_IRS\\_from\\_Democracy\\_21\\_and\\_Campaign\\_Legal\\_Center\\_9\\_28\\_2011.pdf](http://www.campaignlegalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf).

<sup>10</sup> See Maggie Haberman, *Coordination Rules A One-Way Street*, Politico, May 2, 2012, <http://www.politico.com/news/stories/0512/75834.html> (top Republican strategist who advised American Crossroads joined Romney campaign as Senior Adviser).

<sup>11</sup> See Al Shaw, *et al.*, *A Tangled Web: Who's Making Money from All This Campaign Spending?*, ProPublica, <http://www.propublica.org/special/a-tangled-web> (last updated Mar. 21, 2012); see, e.g., Schouten, *supra* n.6 (super PAC uses same polling and direct-mail consultant as campaign).

<sup>12</sup> See, e.g., Schouten, *supra* n.6 (President Obama's campaign manager at a Priorities USA fundraiser); Wang, *supra* n.6 (Rep.

are "fully coordinated" with a candidate, feature an appearance from the candidate, and follow a script reviewed and approved by the candidate.<sup>13</sup> In some cases, super PACs have simply reused and repackaged material from the candidate's old advertisements.<sup>14</sup>

*Strategic Timing.* In light of their closely connected staff and fully coordinated fundraising efforts, it should come as little surprise that super PACs have been acting as successful surrogates for campaign committees in states where the candidate has made few appearances or spent little money on advertising.<sup>15</sup> The candidate and the super PAC need not

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Pelosi and Sen. Reid fundraising for super PACs; also Mitt Romney for Restore Our Future).

<sup>13</sup> Kim Geiger, *FEC Deadlocks on Question of Coordinated Advertising*, L.A. Times, Dec. 5, 2011, <http://articles.latimes.com/2011/dec/05/news/la-pn-crossroads-fec-20111205>; see American Crossroads, Request for FEC Advisory Opinion, No. 2011-23, at 3 (Oct. 28, 2011) (advertisements "would be fully coordinated with incumbent Members of Congress facing re-election in 2012 insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement").

<sup>14</sup> American Crossroads, *supra* n.13, at 3 n.2 (advertisements "may include phrases or slogans that the featured [candidate] has previously used"); Schouten, *supra* n.6 (super PAC ran television commercial candidate aired in 2007 during previous campaign).

<sup>15</sup> See Jim Rutenberg & Nicholas Confessore, *A Wealthy Backer Likes the Odds on Santorum*, N.Y. Times, Feb. 8, 2012 (candidate-specific super PAC spent millions to win Minnesota for Santorum, when candidate had no money left to spend); Molly Redden, *Mitt Romney's Southern Strategy*, Salon, Mar. 28, 2012, [http://www.salon.com/2012/03/28/mitt\\_romneys\\_southern\\_strategy](http://www.salon.com/2012/03/28/mitt_romneys_southern_strategy) (candidate-specific super PAC "consistently

communicate for spending to be coordinated in this way; news articles and shared consultants provide all the information a super PAC needs to direct the money to where it is needed most.<sup>16</sup>

In sum, super PACs *are* coordinating with campaigns, and they are using methods the Court did not contemplate in its *Citizens United* decision. Contrary to the Court's assumption, there is now little distinction in practice between a contribution to a candidate-specific super PAC and a direct contribution to the candidate's campaign, other than its being unlimited, and potentially concealed.<sup>17</sup>

## 2. Disclosure Rules Are Inadequate.

The second critical assumption of *Citizens United* was that unlimited independent expenditures would take place under the glare of complete and effective disclosure. That is plainly not the case today. Much of the outside money spent in the 2010 election came from groups that are not required to – and do not – disclose their donors.

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spent millions in Southern primaries" including in one state where candidate bought no television advertising).

<sup>16</sup> See Wang, *supra* n.6 (quoting public statements by campaign officials about spending strategy); Redden, *supra* n.15 (quoting former FEC counsel: "This is clearly not being done by people who have absolutely no idea what the candidate or campaign is doing").

<sup>17</sup> Cf. Norman Ornstein, *Effect of Citizens United Felt Two Years Later*, Roll Call, Jan. 18, 2012 (the mandatory non-coordination disclaimer at the end of a super PAC's advertisement is "nonsensical," and voters realize super PACs "are effectively arms of the campaigns," but "without any of the restrictions or timely disclosure requirements the candidates themselves face").



Certain types of political spending groups, organized under section 501(c) of the tax code, are not required to disclose their donors to the public, but only to the IRS on confidential grounds. These groups include so-called social welfare groups, which are permitted to engage in political advocacy so long as it is not the organization's primary purpose. See 26 U.S.C. § 501(c)(4); 26 C.F.R. § 1.501(c)(4)-1(a)(2). Several "(c)(4)" entities have interpreted IRS rules to allow them to spend up to *49 percent* of their funds on express advocacy<sup>18</sup> – and one has evidently spent 87 percent of its funds on political ads.<sup>19</sup> When a (c)(4) organization spends money on political advocacy, its donors are not publicly disclosed.

Much of the outside money spent on electioneering communications in the post-*Citizens United* 2010 election came from (c)(4) organizations and other non-disclosing groups. These organizations spent so much money – \$134 million – that by the end of the 2010 cycle, they accounted for 47 percent of all outside political spending.<sup>20</sup> In the 2006 election, by contrast, these groups spent \$0.<sup>21</sup>

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<sup>18</sup> Letter to IRS from Campaign Legal Center, Sept. 28, 2011, at 1, [http://www.campaignlegalcenter.org/attachments/Letter\\_to\\_the\\_IRS\\_from\\_Democracy\\_21\\_and\\_Campaign\\_Legal\\_Center\\_9\\_28\\_2011.pdf](http://www.campaignlegalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf).

<sup>19</sup> Letter to IRS from Campaign Legal Center, Dec. 14, 2011, at 3, [http://www.campaignlegalcenter.org/attachments/IRS\\_LETTER\\_12\\_14\\_2011.pdf](http://www.campaignlegalcenter.org/attachments/IRS_LETTER_12_14_2011.pdf).

<sup>20</sup> Spencer MacColl, *A Center for Responsive Politics Analysis of the Effects of Citizens United*, May 5, 2011, at 4, 5, available at <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

<sup>21</sup> See Richard L. Hasen, *The Numbers Don't Lie*, Slate, Mar. 9, 2012, [http://www.slate.com/articles/news\\_and\\_politics/politics/](http://www.slate.com/articles/news_and_politics/politics/)



Super PACs, 501(c)(4) organizations and political campaigns are knitted into a fundraising web that allows unlimited, non-independent and anonymous (to the public) political donations for the benefit of a specific candidate. With respect to political campaigns, the disclosure issue is not limited to what would be characterized as larger donations. For instance, political campaigns are not required to disclose contributions that are \$200 or less. Additionally, under IRS rules, (c)(4) groups are permitted to make independent expenditures in their own name, to donate money to super PACs, and to give to other (c)(4) entities. As a result, a person or company seeking to support or influence a candidate without public disclosure can donate to a (c)(4), which will in turn do one of three things: (1) spend the money on advocacy, (2) donate it to a super PAC to spend on advocacy, or (3) donate it to another (c)(4), which would then have the same set of options, behind an additional layer of "identity-laundering" for the donor.

Many of the most prominent super PACs have created affiliated (c)(4) entities to take advantage of the considerable sums of anonymous money they can raise.<sup>22</sup> In one instance, the (c)(4) had supplied the

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[2012/03/the\\_supreme\\_court\\_s\\_citizens\\_united\\_decision\\_has\\_led\\_to\\_an\\_explosion\\_of\\_campaign\\_spending.html](http://www.propublica.org/article/with-spotlight-on-super-pac-dollars-nonprofits-escape-scrutiny).

<sup>22</sup> See Kim Barker, *et al.*, *With Spotlight on Super PACs, Nonprofits Escape Scrutiny*, ProPublica, Feb. 3, 2012, <http://www.propublica.org/article/with-spotlight-on-super-pac-dollars-nonprofits-escape-scrutiny>. Super PACs with 501(c)(4) affiliates include: Priorities USA Action (Priorities USA); American Crossroads (Crossroads GPS); Majority PAC (Patriot Majority USA); FreedomWorks for America (FreedomWorks, Inc.); American Bridge 21st Century (American Bridge 21st Century Foundation). Priorities USA Action and American

super PAC with almost half of its \$3 million in funding.<sup>23</sup> Another group, American Crossroads, set up its (c)(4) affiliate, Crossroads GPS, precisely because "some donors didn't want to be disclosed."<sup>24</sup> Crossroads GPS spends 40 percent of its money on explicit, declared political activity.<sup>25</sup> Moreover, as part of its mandatory "non-political" spending, it gave several million dollars to a dozen groups that in turn spent

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Bridge 21st Century received \$438,000 from their affiliated nonprofits last year. A Democratic-leaning super PAC, Citizens for Strength and Security, reported that almost all of its \$72,000 came from a (c)(4) – also called Citizens for Strength and Security. The super PAC FreedomWorks for America reported that half of the contributions it received last year – \$1.34 million – were "in kind" payments from its affiliate (c)(4), FreedomWorks, Inc.

<sup>23</sup> Robert Maguire & Viveca Novack, *The FreedomWorks Network: Many Connections, Little Disclosure*, Center for Responsive Politics, Open Secrets Blog, Mar. 16, 2012, <http://www.opensecrets.org/news/2012/03/if-tk-year-veteran-indiana-sen.html>.

<sup>24</sup> Kenneth P. Vogel, *SEIU, American Crossroads Look Back at 2010 Spending*, Politico, Dec. 13, 2010, <http://www.politico.com/news/stories/1210/46355.html> (quoting super PAC's political director); *see also* Vogel, *Both Sides Now in Dash for Political Cash*, Politico, Jun. 29, 2011, <http://www.politico.com/news/stories/0811/60731.html> (quoting Democratic strategist: "Many such donors [to (c)(4) organizations] 'feel more comfortable donating to groups that don't disclose' because they do not want publicity or to be on fundraising lists).

<sup>25</sup> Michael Luo, *Groups Push Legal Limits in Advertising*, N.Y. Times, Oct. 17, 2010.

millions on independent expenditures and electioneering communications.<sup>26</sup>

Even excluding the (c)(4) organizations, many of the top donors to super PACs are themselves limited-liability corporations or otherwise obscure entities.<sup>27</sup> *Cf. McConnell*, 540 U.S. at 197 (federal disclosure laws intended to prevent confusion by groups “hiding behind dubious and misleading names”). Many have only a P.O. Box as an address; and several – including the single largest donor in 2010 and 2011 – have been discovered to be primarily pass-through entities for wealthy individuals.<sup>28</sup>

The coupling of 501(c) anonymity and corporate obscurity to super PAC fundraising and coordination has catalyzed an explosion of undisclosed outside spending, which this Court could not foresee when it suggested that disclosure rules are an “adequate” and “effective” means of serving the public’s substantial information interest. 130 S. Ct. at 916; *cf. McConnell*, 540 U.S. at 197 (noting that plaintiffs “never satisfactorily answer[ed] the question of how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public”). Where the spending is on negative attack ads, the substance of the ad might

<sup>26</sup> Viveca Novack & Robert Maguire, *For Friends, Crossroads Helps With the Tab*, Center for Responsive Politics Open Secrets Blog, Apr. 18, 2012, <http://www.opensecrets.org/news/2012/04/for-friends-crossroads-helps-with-t.html>.

<sup>27</sup> See Demos & U.S. PIRG Education Fund, *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, Feb. 8, 2012, at 17, table 1, available at <http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election>.

<sup>28</sup> See N.Y. Times, *Who’s Financing The Super PACs*, at <http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html> (last updated May 7, 2012).

not even provide a hint of what interest is behind the expenditure.

**B. Unlimited, Coordinated and Undisclosed Spending Creates a Strong Potential for *Quid Pro Quo* Corruption.**

The unprecedented scale of new spending, often on negative attack ads, coupled with the failure of the disclosure and coordination rules, enhances the risk of corruption. Counting both independent expenditures and spending on electioneering communications,<sup>29</sup> outside spending on the 2010 election exceeded spending by political parties, \$289 million to \$184 million.<sup>30</sup> Of the \$210 million spent on independent expenditures alone, two-thirds of that money came from groups that benefited from the removal of caps on corporate donations after *Citizens United*.<sup>31</sup>

For the 2012 election, outside spending exceeded \$120 million as of May 14, with six months still to go.<sup>32</sup> That is double the amount spent by this date in the 2008 presidential election cycle. As the election nears, the pace of outside spending will significantly augment these already massive figures. Super PACs, which alone have spent over \$100 million in

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<sup>29</sup> "Independent expenditures" fund express advocacy for or against a candidate, as opposed to "electioneering communications," which are advertisements that appear in the 30 days preceding a primary or 60 days preceding a general election and mention a candidate's name but do not expressly advocate for or against that candidate. These figures exclude spending by political parties.

<sup>30</sup> MacColl, *supra* n.20, at 11.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> Statistics in this paragraph are taken from the Center for Responsive Politics Outside Spending Database, [http://www.opensecrets.org/outside-spending/cycle\\_tots.php](http://www.opensecrets.org/outside-spending/cycle_tots.php).

this election cycle, have another \$100 million on hand to spend in the remaining months leading up to November – meaning that those groups can spend over half a million dollars *every day* (\$570,000) until the election, without even raising another cent.

As for spending by 501(c)(4) nonprofit organizations, there is no way to predict how much they will spend on the 2012 election – because they disclose their finances after the election year – but it is estimated they will spend more than super PACs this election cycle.<sup>33</sup>

A well-heeled super PAC can now influence or threaten to influence a race with a single mammoth expenditure. The ongoing presidential primary season has shown this to be true on several occasions.<sup>34</sup> The dominating influence of super PACs is particularly significant for those in congressional races with

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<sup>33</sup> Dan Eggen, *Most Independent Ads for 2012 Election Are From Groups That Don't Disclose Donors*, Wash. Post, Apr. 24, 2012 (“The numbers signal a *shift* away from super PACs, which are required to disclose their donors” toward “big-spending nonprofits that do not have to identify their financial backers.”).

<sup>34</sup> See Brody Mullins & Danny Yadron, *Gingrich Super PAC's Funding Runs Dry*, Wall Street Journal, Mar. 21, 2012 (candidate won South Carolina primary despite ranking fourth in Iowa “in part because [the Gingrich super PAC] spent nearly \$1 million on TV ads for him in the final week, while his own campaign could muster only \$337,000”); Rutenberg & Confessore, *supra* n.15 (candidate who “could not afford to pay for a single commercial” at the time won Minnesota primary owing to the “critical support” of a super PAC); see also Evan Mackinder, *Super PACs Cast Long Shadow Over 2012 Race*, Center for Responsive Politics Open Secrets Blog, Mar. 21, 2012, <http://www.opensecrets.org/news/2012/03/super-pacs-continued-to-show.html> (super PACs’ earlier support for several failed candidates was “propping them up entirely”).



smaller media markets, such as Montana's, and makes it all the easier for those seeking legislative favors and results to discreetly threaten such expenditures if Members of Congress do not accede to their demands.<sup>35</sup>

A promise or threat to a candidate that goes unseen or unheard by the public is a means of corruption that was not considered in *Citizens United*. This massive leverage goes beyond the mere "influence" this Court deemed inadequate to support the restrictions at issue in that case. *Cf. Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) ("there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign"). The Court in *Caperton* found that the remedy for such massive expenditures was recusal by the Judge – but there is no such remedy available for Members of Congress.

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The Court's opinion in *Citizens United* could not account for the particular risks and appearances of

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<sup>35</sup> See, e.g., *This American Life*, *supra* n.4 (super PAC's \$680,000 expenditure paid for negative advertisement to be shown so frequently that average viewer was likely to see it 16 times per week; in same period, target candidate's support dropped six percentage points). As of March 5, 2012, 54 percent of money spent in the 2012 presidential election (over \$35 million) was spent on negative attack ads. The Restore Our Future PAC supporting Mitt Romney spent 97 percent of its \$31 million in spending on negative ads against Rick Santorum and Newt Gingrich. Dave Johnson, *Super PAC Hate-Spending*, Mar. 9, 2012. [http://www.alate.com/articles/news\\_and\\_politics/map\\_of\\_the\\_week/2012/03/where\\_super\\_pacs\\_are\\_spending\\_their\\_money\\_and\\_how\\_.html](http://www.alate.com/articles/news_and_politics/map_of_the_week/2012/03/where_super_pacs_are_spending_their_money_and_how_.html).



corruption, by expenditures or by threats and promises, associated with super PACs and (c)(4) entities. Put succinctly, the protective factors that the *Citizens United* Court invoked when it stated that independent expenditures present no risk of corruption have not materialized.

**C. The Appearance of Corruption Created by Independent Expenditures is Strong.**

In *Citizens United*, this Court held there could be no “appearance of corruption” associated with independent expenditures to the extent they secure only “access” and “influence,” and are “not coordinated” with a candidate. 130 S. Ct. at 909-910. As shown above, these assumptions no longer hold; therefore, the Court’s assessment of the potential for perceived corruption is worth reconsideration.

Americans believe that the current system of campaign finance is corrupt, and that *Citizens United*, thanks to the anonymous spending it unleashed, has made the problem worse. A recent study by the Pew Center found that 65 percent of registered voters who had heard of *Citizens United* said super PAC spending has had a negative effect on the 2012 presidential campaign.<sup>36</sup> There was no partisan divide on this question: 60 percent of Republicans, 63 percent of Democrats, and 67 percent of independents who had heard of the decision believe it has had a negative effect on the campaign.

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<sup>36</sup> Pew Research Center for People and the Press, *Super PACs Are Having A Negative Impact, Say Voters Aware of 'Citizens United' Ruling* (Jan. 17, 2012), <http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf>

Another recent study<sup>37</sup> found that 80 percent of voters think there is too much “big money” spent on political campaigns and elections and that campaign contributions and spending should be limited. A large majority – including 75 percent of independents – believe that big donors and secret money<sup>38</sup> undermine democracy, and 62 percent said they oppose the *Citizens United* decision.

Trust in public institutions is at an all-time low, in part because of the perceived influence of money in politics. When Americans believe the campaign finance system has been corrupted, they lose faith in their democracy. The appearance that large special interest donors, including corporations and labor organizations which have the ability to manipulate the campaign finance system, hold undue sway over elected officials tarnishes our American democracy. It can lead voters to disengage from healthy political engagement. And that, in turn, compounds the problem, increasing cynicism in a vicious cycle undermining representative democracy.

Poll results should not direct Court decisions. But these results show that the Court’s assessment of perceived corruption was at odds with the perception held by most Americans. Only plenary review will provide the Court with the opportunity for full inquiry into the harms to American democracy caused by the appearance and threat of corruption.

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<sup>37</sup> Democracy Corps & Public Campaign Action Fund, *Two Years After Citizens United, Voters Fed Up with Money in Politics* (Jan. 19, 2012), <http://www.democracycorps.com/wp-content/files/PCAF-memo-FINAL1.pdf>.

<sup>38</sup> Secret money could include contributions to political campaigns that do not reach the amount threshold of current disclosure requirements.

The campaign finance system assumed by *Citizens United* is no longer a reality, if it ever was. The Court, if it grants the petition, should use this case to make clear that when legislatures build an appropriate record demonstrating the potential for corruption or the appearance thereof created by independent expenditures, they may enact appropriately tailored preventative legislation in response. The integrity of America's elections has long been a bulwark of our nation and a beacon to other nations, and it is a worthy exercise of this Court's attention to protect our elections from the manifest damage of its decision allowing the vast, unregulated expenditures that now darken our political landscape.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied or in the alternative granted for plenary review of the question presented.

Respectfully submitted,

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